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TO EXAMINE PROBLEMS CONFRONTING SMALL BUSINESSES AND EPA'S REGULATIONS ON UNDERGROUND STORAGE TANKS

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

PROBLEMS CONFRONTING SMALL BUSINESSES IN TRYING TO COMPLY WITH THE ENVIRONMENTAL PROTECTION AGENCY'S REGULATIONS ON UNDERGROUND STORAGE TANKS

MARCH 21, 1990

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March 21, 1990:
- Morning session 1

TO EXAMINE PROBLEMS CONFRONTING SMALL BUSINESSES AND EPA'S REGULATIONS ON UNDERGROUND STORAGE TANKS

WEDNESDAY, MARCH 21, 1990

U.S. SENATE,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to notice, at 9:33 a.m., in room 428–A, Russell Senate Office Building, Hon. Rudy Boschwitz presiding.

STATEMENT OF HON. CONRAD BURNS, A U.S. SENATOR FROM THE STATE OF MONTANA

Senator BURNS [presiding]. We will open the hearings this morning. I'm Senator Burns from Montana.

All the leadership is involved in Clean Air. And I guess we are going to try to deal with the other end of the environmental spectrum this morning. We thank you for showing up, and I know there will be a lot of us in and out because I have a very important hearing on communications that is coming up in about 20 minutes or so. And we will be kind of jogging back and forth today. It seems like it is going to be one of those days where we will have to do everything on the fly.

But nonetheless, as I look around, I understand that maybe here is a man that wants to chair this little get together, Senator Baucus. But we will open it up.

As you know, I have introduced S. 1560 back in August of last year to try to deal with the $1 million financial responsibility problem facing the owners of underground storage tanks. When I drafted this bill, I in no way wanted to relieve the marketers from cleaning up leaks or problems that we have with underground storage. I believe it would be more environmentally sound, however, to spend those dollars that would have gone into insurance premiums—and costly insurance premiums I might add—if the insurance can be found at all, is to funnel that money into the real problem that we have, and that is upgrading our underground storage facilities and also taking care of the environmental problems with leaking tanks.

The Federal regulations only drain the small businessman's bank account, and it does not prevent one drop of gasoline or corrosives leaking into groundwater. And I just could not see the common sense of the EPA regulation. I should have known that because Congress wrote the regulations and sometimes we have the ability

to out-think ourselves, and maybe we over-thought this one just a little bit.

Through the efforts of a lot of us, several of my colleagues met in both the Senate and the House of Representatives. We were able to have a meeting with the EPA and plead the tank owner's case. And a week ago today, the EPA, of course, announced that they are giving us a little time to find some new ways of approaching this problem. They have extended the financial liability deadline now for another year to 1½ years depending on which category that you fall in, a class 3 or a class 4 category.

And the class 4 category also takes into account local governments because not only was the private sector impacted by this regulation, it also impacted the ability of local governments to deal with their underground storage problems also because they have a very big investment in this. And I think when you take a look at the total number of tank owners across the country, this encompasses about 70 to 80 percent of the tank owners we have in the ground.

So, I applaud the EPA in their wisdom to sort of extend this liability that is put on tank owners, but I also would want to warn that all the marketers and, of course, local governments that this is still a problem and we must find ways to clean it up.

One station out of several hundred in Montana that has been temporarily saved is the one at Virginia City, MT, which that owner was going to have to close up. Now he is extended for 1 year. And they have about 250,000 tourists through that little town. If you can imagine it is only a town about the size of this scratch pad up here and, of course, tourism is their main livelihood there. And it only has one gas station. And we have many of those kinds of situations in the State of Montana.

So, the delay is a great first step, but our job is not over. There still exist the problems in regulations that we must begin to deal with today and not 11 months from now.

I believe that the tank owners need help from the Small Business Administration encouraging banks to help finance technical improvements so marketers can ensure their tanks are environmentally sound and thus break the catch 22 situation that they are caught in now. Currently banks tell small business owners that they will only finance installation of new and upgraded tanks if the tanks are insured against possible leaks. At the same time, insurance companies, when they are available, will not offer tank insurance until existing tanks have been either upgraded or replaced.

Another problem that must be addressed is that of liability. The Committee needs to discuss the role of third-party liability and the definition of owner according to RCRA and the LUST Trust Fund to help clarify lender and liability issues. It was not until the end of the day that I found out there was even an acronym around here of "LUST". It was nothing like what I had envisioned it. [Laughter.]

The Committee also needs to discuss the possibility of extending section 4081(d)(2) of the Tax Code which collects the 1 cent per gallon of additional period and allows the collection of those funds beyond the current $500 million cap. I think we have to look at that.

So, we appreciate your coming up. I realize now that we are into the situation of the extension. We know that the bill is not a panacea that covers all the ground that needs to be covered now, but I think now is the time that we can go to work and fine-tune that piece of legislation to where it will be acceptable to all parties concerned.

I am happy to work with the Senior Senator from Montana who Chairs the Environmental Subcommittee to use my bill as a base from which to build some sort of corrections in this regulatory problem.

[The prepared statement of Senator Boschwitz follows:]

STATEMENT OF SENATOR RUDY BOSCHWITZ
SMALL BUSINESS COMMITTEE HEARING ON
UNDERGROUND STORAGE TANK REGULATIONS

BEFORE I BEGIN, I WOULD LIKE TO EXTEND MY GRATITUDE TO ALL OF OUR WITNESSES WHO HAVE TAKEN TIME AWAY FROM BUSY SCHEDULES TO TESTIFY.

THE ENVIRONMENTAL PROTECTION AGENCY'S DECISION TO EXTEND THE DATES FOR ESTABLISHING FINANCIAL RESPONSIBILITY BY ONE YEAR IS TERRIFIC NEWS. EPA'S DECISION GIVES US TIME TO REVIEW THE FINANCIAL RESPONSIBILITY REGULATIONS AND RESPOND APPROPRIATELY. IN THIS WAY WE CAN ADDRESS ENVIRONMENTAL CONCERNS, WHILE PRESERVING A BUSINESS CLIMATE IN WHICH SMALL COMPANIES CAN CONTINUE TO OPERATE. I WANT TO ACKNOWLEDGE AND THANK MY FRIEND SENATOR CONRAD BURNS FOR HIS EFFORT IN BEHALF OF THIS EXTENSION.

I BELIEVE THAT GROUNDWATER PROTECTION MUST BE A PRIORITY OF THE FEDERAL GOVERNMENT IF WE ARE TO ASSURE ADEQUATE SUPPLIES OF CLEAN AND SAFE DRINKING WATER. OF COURSE, LEAKING UNDERGROUND STORAGE TANKS THREATEN THE QUALITY OF OUR GROUNDWATER THROUGHOUT THE COUNTRY. I SUPPORT THE ENVIRONMENTAL PROTECTION AGENCY'S EFFORTS TO ADDRESS THIS PROBLEM.

I AM CONCERNED, HOWEVER, ABOUT THE IMMENSE BURDEN PLACED ON TANK OWNERS BY THE FINANCIAL RESPONSIBILITY REQUIREMENTS INCLUDED IN THE PROPOSED EPA REGULATIONS. SPECIFICALLY, I QUESTION WHETHER SMALL COMPANIES WILL BE ABLE TO OBTAIN THE $1 MILLION, AND IN SOME CASES, $2 MILLION STANDBY COVERAGE CALLED FOR IN THE REGULATIONS. FIRST OF ALL, THE TYPE OF INSURANCE NEEDED TO COVER LIABILITY AND CLEAN UP COSTS FOR TANK OWNERS IS SCARCE. SECOND, EVEN WHEN IT IS AVAILABLE, I AM CONCERNED THAT THE AVERAGE TANK OWNER WILL FIND IT PROHIBITIVELY EXPENSIVE. I AM AFRAID THAT MANY WILL BE FORCED TO CLOSE THEIR BUSINESSES. RURAL AREAS, INCLUDING MUCH OF MY OWN STATE OF MINNESOTA, WOULD BE HIT HARDEST.

THIS MORNING'S TESTIMONY IS IMPORTANT BECAUSE IT WILL CONTAIN MUCH NEEDED FEEDBACK ON THIS ISSUE. SINCE CONGRESS PASSED THE LEGISLATION UPON WHICH THE EPA REGULATIONS ARE BASED, IT IS UP TO CONGRESS TO MODIFY IT IF NECESSARY.

ONE OF THE MOST PROMISING METHODS FOR DEMONSTRATING FINANCIAL RESPONSIBILITY IS THROUGH THE USE OF STATE FUND PROGRAMS. FOR EXAMPLE, IN MINNESOTA, THE DEPARTMENT OF COMMERCE MANAGES A PETROFUND THAT PAYS TO CLEAN UP LEAKING UNDERGROUND STORAGE TANKS. THE PETROFUND IS FINANCED BY A FEE ASSESSED AGAINST THE JOBBER, OR WHOLESALER. IT IS DESIGNED TO REIMBURSE TANK OWNERS FOR UP TO 90 PERCENT OF THEIR TOTAL INVESTIGATIVE AND CORRECTIVE ACTION COSTS FOLLOWING A LEAK, UP TO $250,000. THE PETROFUND MAY ALSO COVER SOME THIRD-PARTY DAMAGES. I STRONGLY

SUGGEST THAT EPA TAKE ADVANTAGE OF THIS REPRIEVE TO EXPLORE WAYS TO EXPEDITE THE APPROVAL OF STATE FUND PROGRAMS WHICH HAVE BEEN SUBMITTED FOR REVIEW.

I LOOK FORWARD TO HEARING THIS MORNING'S TESTIMONY. I AM PROUD THAT THIS COMMITTEE IS TAKING ACTION IN THE WAKE OF THE DECISION TO DELAY THE REGULATIONS. I AM CONFIDENT THAT BY WORKING TOGETHER, WE WILL FIND A WAY TO MAKE A GOOD ENVIRONMENTAL LAW WORKABLE FOR ALL PARTIES BY THIS TIME NEXT YEAR.

Senator BURNS. I welcome Senator Baucus here this morning, and if you have an opening statement, we would like to hear from you now. Thank you for coming.

STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Thanks, Conrad.

Last month I introduced the Underground Storage Tank Pollution Prevention and Assistance Act. This legislation is needed to help small service stations, especially those in rural areas, comply with Federal underground storage tank requirements. I introduced this legislation after I held a hearing of the Environmental Protection Subcommittee, the committee with jurisdiction, to review the problems that many tank owners are having in complying with the Underground Storage Tank Program. Congress and the Environmental Protection Agency must address these serious problems if the Underground Storage Tank Program is going to work. Let me spend a moment to describe the key problems as I see them.

First, the Underground Storage Tank Program is not working as planned. Congress envisioned that the program requiring small gas station owners to install leak detection equipment first, to act to upgrade and/or replace leaking tanks next, and finally to require the station owners to purchase financial insurance for their investment. Instead, the EPA has implemented a program where most underground tank owners need insurance even before they are required to install leak detection equipment.

The problem is that tank owners cannot get insurance until they upgrade or replace their tanks or otherwise insure that there is no contamination. Most insurance companies generally require a clean bill of health before they will write a policy. Other insurers may write policies, but with premiums as high as $15,000 per tank.

A related problem is that many tank owners cannot get the money they need to clean up prior releases, nor can they get the money needed to test their tanks for leaks or to upgrade or replace their tanks. Lenders are unwilling to loan money to tank owners out of fear of future liability.

Still another problem is that pollution insurance may not be as readily available as hoped. These concerns are real. Many tank owners, especially small owners and operators, have limited access to the capital they need to replace their tanks, and these tank owners could face costly insurance premiums, particularly if their tanks are bare steel or if their tanks are currently leaking.

In my home State of Montana, one-third of the 11,000 tanks are considered high-risk tanks. They are made of uncoated steel and have been around for more than 15 years. These tanks may be storing millions of gallons of petroleum, solvents, and other chemicals that were leaked through loose valves, overfilling and corrosion unless they are replaced.

For some communities in Montana, it is already too late. Tanks at some 250 facilities are leaking and contaminating the soil and groundwater. In several communities, municipal water supply wells have been closed after being contaminated by leaking underground storage tanks.

Leaking underground storage tanks clearly present a very real threat to our health and our environment. We must clean up existing contamination and protect against new contamination. Unfortunately, small businesses are fighting an uphill battle to comply with EPA's tank requirements. If we are to ensure public health for everyone and prevent new problems from occurring, we must help these tank owners with their concerns.

My legislation does just that. It ensures that small businesses, including convenience stores and mom and pop gas stations will be able to stay in business and protect our health and the safety of our drinking water. The bill ensures this by providing for the establishment of a Loan Guarantee Program. It authorizes the EPA to guarantee loans to small, disadvantaged businesses. This program makes it much easier for small, disadvantaged businesses to receive the necessary financing for replacing unprotected, bare steel tanks with the newest tanks available.

The program will pay for itself. The funding for this program will come from the Leaking Underground Storage Tank Trust Fund, which is currently used to clean up contamination that has already occurred. This bill simply allows the fund to guarantee loans to small, disadvantaged businesses so they can replace their tanks before they leak.

My legislation also would have extended by 1 year the EPA insurance compliance date for small gas station owners, a provision that is now no longer needed. Last Friday, for example, the EPA agreed to do just that. They will extend the compliance deadline for small gas station owners and businesses to obtain insurance for underground tanks. I am glad the EPA has extended the compliance deadline. The bureaucrats listened to our views, and this time they changed their minds.

For Montana gas station operators, a 1 year extension should provide time for more insurance to become available. One more year should provide the time for more of our tanks to be tested, upgraded or replaced so they are more insurable and safer for our communities. While Montana's insurance fund is in place and approved, one more year should give other States the time they need to get their insurance funds in place and approved by the EPA.

We must move forward in implementing the Underground Storage Tank Program. It is important to our drinking water safety, our health, and our economic future that we do so. This bill will help many tank owners get on the right track so that we can make real, substantial progress. Small towns in Montana and other States face threats to the drinking water from leaking underground storage tanks, but the Federal program we are depending on to move that threat faces serious problems as well. Without changes, this program could force small gas station owners to close and move out of the small towns they serve and leave behind them an environmental mess for others to clean up. My legislation can reduce the threat. We can resolve this issue without threatening our small mom and pop gas stations and services. We must work to keep our small community businesses and service stations alive and operating in a safe, environmentally sound manner.

Senator BURNS. Thank you, Senator Baucus.

Senator Grassley from Iowa.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Mr. Chairman, I will be dividing my time this morning between this Committee and the Agricultural Subcommittee of Appropriations. We also have a vote at 10 o'clock. Consequently, I will submit some questions for answers in writing. So, I hope you will appreciate my necessity for doing that.

I want to thank the Committee leadership for holding this hearing on the difficulties that small businesses face in complying with the Environmental Protection Agency's requirements for underground storage tanks. This is a very important issue. I hear an awful lot about this issue in my State, even though my State legislature has taken some action in this area, but even more so hearing my colleagues talk about it being a problem in their State. I know it is something that this Committee ought to be dealing with, as well as the State legislatures.

In response to the problems in my State and the requirements of EPA, Iowa has developed, I believe one of the most comprehensive underground storage tank programs in effect today. The Iowa-enacted legislation addresses the needs of the underground storage tank owners from beginning to end. The intent of the Iowa legislation is to provide assistance to ensure that the small, independent operators are not forced out of business by the enormous costs which are necessary for complying with the EPA regulation. Iowa's program offers remedial assistance for cleanups. It has established an insurance program for small, independent operators whose third party insurance is limited in availability and is very expensive. Iowa has also established a loan program to help owners with the costly expense of upgrading and replacing faulty tanks.

However, problems still exist. The costs of complying with regulations is tremendous. The potential of third party liability looms as a deterrent to many lenders, liability coverage is hard to find and prohibitively expensive for those who do not meet the criteria to participate in this Iowa program.

Even though my State has made an effort in this direction, there are still problems that we have to look at, and this Committee is a good forum for looking at those problems and trying to find a solution. I hope that the recommendations of our witnesses help us find a solution to this problem because we should not be passing these regulations that are going to force a lot of necessary small businesses, particularly in our small communities, out of business.

Thank you, Mr. Chairman.

Senator BURNS. Thank you, Senator Grassley.

Senator Pressler, do you have an opening statement?

STATEMENT OF HON. LARRY PRESSLER, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator PRESSLER. Mr. Chairman, I have an opening statement which I will submit for the record in the interest of hearing these fine witnesses.

But let me say that many of our small businessmen feel very harassed by some of these regulations, which in some places do not make any sense. We are all for clean groundwater, a clean environ-

ment, but sometimes in the enthusiasm in drafting some of these regulations, common sense and achieving the real objective is overlooked and great expense befalls every small businessman.

Also, a lot of small businessmen are out there alone, so to speak. They do not have lawyers or accounting firms, or they do not have anybody to defend them or explain their position. It is not like they are General Motors or similar huge corporations where they have a public relations department or a lobbyist in Washington.

So, I think this hearing is very important today, and I want to commend my friend from Montana for his leadership. Senator Burns has been just a great leader on this subject, and we look forward to the results of this hearing.

[The prepared statements of Senators Pressler, Dixon, Boren, and Wallop follow:]

STATEMENT OF SENATOR LARRY PRESSLER
SMALL BUSINESS COMMITTEE
HEARING ON UNDERGROUND STORAGE TANK REGULATIONS
MARCH 21, 1990

Mr. Chairman, I commend you for calling this hearing on this important topic. I have heard from many small service station owners and others in South Dakota who are terribly concerned about their ability to comply with the financial responsibility regulations governing underground storage tanks.

I would point out that in my discussions with small businessmen on this issue, these small business owners are as concerned about the environment and the purity of our groundwater as anyone else. So I think it is important to point out that it is not a lack of environmental concern that motivates those in South Dakota and elsewhere to protest these regulations.

We have been in this situation before, Mr. Chairman. Congress passes legislation, or the Administration promulgates regulations that we later find to be simply unworkable, overly burdensome, or outright unnecessary. Too often we neglect to take into consideration how this will effect the little guy, the small business, Mainstreet America. In this case, we find that the financial assurance is just not available for these small businesses. Or, if it is available it is not affordable. Obtaining the insurance required by these regulations would put them out of business.

This is why I am a cosponsor of S. 1560. I am pleased the EPA now has announced they will move back the compliance deadlines one year. That is a good first step. It will give us more time to come up with possible legislative and administrative changes to make this more workable.

Protecting our groundwater is an important objective. One that I strongly support. However, I believe we can accomplish that important objective in a way that permits our small service station owners, operators, and others to continue to function effectively.

STATEMENT BY SENATOR ALAN J. DIXON
BEFORE THE SENATE SMALL BUSINESS COMMITTEE
TO EXAMINE THE
ENVIRONMENTAL PROTECTION AGENCY'S REGULATIONS
ON UNDERGROUND STORAGE TANKS
MARCH 21, 1990

MR. CHAIRMAN, I LOOK FORWARD TO THE TESTIMONY THIS MORNING ON THE EFFECTS OF THE EPA'S REGULATIONS CONCERNING FINANCIAL RESPONSIBILITY REQUIREMENTS FOR OWNERS AND OPERATORS OF UNDERGROUND STORAGE TANK SYSTEMS.

ILLINOIS, LIKE ALL STATES, HAS THOUSANDS OF SMALL SERVICE STATIONS AND CONVENIENCE STORES THAT FALL UNDER THESE REGULATIONS. I SUPPORTED THE RESOURCE CONSERVATION AND RECOVERY ACT AND BELIEVE THAT THE AMERICAN PUBLIC MUST BE PROTECTED FROM ANY HARM CAUSED BY LEAKING TANKS. I AM HAPPY TO SAY THAT THE STATE OF ILLINOIS HAS ELECTED TO PROVIDE THE NECESSARY COVERAGE TO THE AFFECTED BUSINESSES. THIS ACTION WILL ELIMINATE ADDITIONAL FINANCIAL HARDSHIP ON THE SMALL BUSINESS COMMUNITY -- THOSE INDIVIDUALS THAT ARE CONTINUOUSLY BEING BOMBARDED FROM WASHINGTON WITH NEW REGULATIONS AND ADDITIONAL PAPERWORK REQUIREMENTS THAT THREATEN THE ABILITY OF MANY TO REMAIN IN BUSINESS.

I WOULD LIKE TO TAKE THIS OPPORTUNITY TO COMMEND THE CHAIRMAN FOR HOLDING TODAY'S HEARING, AND I LOOK FORWARD TO THE COMMENTS OF OUR GOVERNMENT AND PRIVATE SECTOR PANELISTS.

Senator David L. Boren
Opening Remarks before the Small Business Committee
Hearing on the EPA's Regulations
on Underground Storage Tanks
March 21, 1990

I thank you, Mr. Chairman, for conducting this very significant hearing addressing the problems small businesses are encountering in their attempt to comply with the EPA's financial responsibility requirements for underground storage tank (UST) owners.

If you'll remember, Senator Boschwitz, not many months ago you and I co-chaired a hearing that dealt with some onerous tax regulations burdening small business -- regulations which were actually forcing small entrepreneurs out of business. Today we are facing a similar kind of situation. In my home state of Oklahoma, we are already beginning to see the fallout of the EPA financial responsibility requirements -- and it's only going to get worse. How do we address the EPA's very valid pollution concerns without pushing small service stations and convenience stores -- and the rural communities they sometimes serve -- into financial ruin? I am confident that this hearing marks the beginning of the process in which we'll find the answer to that crucial question.

At the outset, I would like to applaud the EPA for extending the deadline for the financial responsibility requirement for category III and IV tank owners. It's a strong signal that the Agency understands the dilemma their requirements deal to small businesses; it's a strong signal that the Agency is willing to negotiate, to compromise, to resolve this problem. I trust that it's an understanding and a willingness that will continue to characterize our dealings with the Agency on this issue.

Of course, the year-long extension doesn't address the real problem here which is a fundamental discrepancy between the EPA's financial responsibility requirements and the ability of small businesses to comply with those requirements. As the regulations stand now, it very simply cannot be done.

The EPA rules require that petroleum marketers prove that they have the financial wherewithal (insurance, for example) to cover costs of at least one million dollars associated with leak cleanups and third-party damages. You don't have to look too hard at this regulation to see how infeasible compliance is.

First of all, the EPA itself has indicated that the cost of cleaning up the average tank leak is about $100,000. And yet

we're requiring petroleum marketers to carry insurance coverage ten times in excess of that amount. I understand that the million dollar figure is a legislated amount, not one that the EPA decided upon (although the Agency did arrive at the highly inflated number of $500,000 for non-marketers), but it's clearly something that must be reviewed.

To buy a million dollars of insurance, a small service station or convenience store owner is looking at premiums of $10,000 a year and up. I can't help but think of all the little rural gas stations in Oklahoma, gas stations serving small communities, the only source of fuel for miles and miles around, gas stations which are just getting by financially as it is . . . Where are they going to come up with $10,000 a year for a million dollar insurance policy on their storage tanks?

Furthermore, where do you buy insurance? Petromark, by far the nation's largest provider of UST insurance has recently announced that it will stop issuing those policies. Almost certainly other insurers will surface, but at present simply finding insurance given the unwillingness of insurers to provide UST insurance creates yet another burden for small businesses.

The crux of the insurance problem, of course, is that many of the tanks subject to the EPA regulations are simply uninsurable: they are old; they are likely to leak sooner or later. Eventually, these tanks must be upgraded or replaced. We all know that and we all want that. But at the cost of running a large percentage of small service stations and convenience stores out of busness? In my mind, that's out of the question. I know that all of my colleagues here share that belief and I certainly hope that the EPA does.

State funds are a part of the answer, but for the time being, only a part. Oklahoma's UST indemnity fund was one of first and it works very well but, like those of most other states, it currently doesn't cover upgrades and it doesn't cover third-party damages. And like most other states, our plan is still awaiting EPA approval.

It is a fortuitous coincidence that many of Senators on this committee are among those most committed to environmental causes. I know that I speak for all of my distinguished colleages when I say we are also committed to the well-being of small businesses in our respective states.

These commitments, of course, need not be at cross-purposes. But as we address the EPA's critical

environmental objectives, let's remember that there are business at stake, there are communities at stake. I am confident that we can achieve a balance, protecting both the environment and our small businesses and I'm very much looking forward to today's hearing as a first step toward identifying and reaching that balance.

Thank you, Mr. Chairman.

STATEMENT BY SENATOR MALCOLM WALLOP

BEFORE THE SENATE COMMITTEE ON SMALL BUSINESS

REGARDING THE EPA UNDERGROUND STORAGE TANK REGULATIONS

WEDNESDAY, MARCH 21, 1990

Mr. Chairman, thank you very much for taking the time to schedule this hearing. I look forward to our discussions here today on how we might solve some of the problems facing small businesses attempting to comply with the financial responsibility requirements for underground storage tanks (UST). Although the Environmental Protection Agency did recently implement a one-year delay in the compliance date for these stringent regulations, I'm sure we all agree that changes must be made in the law to allow for those who are either unable to obtain liability insurance or find it too costly.

In my own state of Wyoming, I have discussed this particular problem with a small business owner, Frank Reyes, who has, since December 22, 1989, shut off his pumps because he could not obtain the necessary liability insurance. Frank has been in business in Green River for 30 years and his tanks are 25 years old. The insurance company he contacted would not insure his old tanks even though they did not leak. As a result, Frank contacted a company in Lander, Wyoming about removing his old tanks in order to install new, insurable tanks.

The estimate he was given cited the removal as $1,200 per tank, plus additional expenses upwards of $400 to destroy the tanks properly. After obtaining this estimate, Frank gathered figures on how much it would cost to install new tanks. The first figures indicated it would cost him $70,000 to replace the tanks outfitted with the proper equipment. That estimate has now more than doubled and the liability insurance would cost Frank $1,000 a month. It would appear that we not only have created a costly problem for small businesses, but we have created a rather lucrative cottage industry. Tank and tank removal companies now realize that small companies must comply with these regulations. As a result, the small mom and pop operations are being forced to pay exhorbitant cleanup prices and we seem to be falling into a situation similar to that of asbestos removal. This is one aspect of the problem which I would like to see addressed or I fear that not only will small businesses be compelled to close, but the consumer will continue to see gas prices increase.

In addition to these problems confronting small businesses, not all states have adopted and had liability funds approved by the Environmental Protection Agency. I am pleased to see, however, that Wyoming Governor Mike Sullivan recently submitted a liability insurance pool plan to EPA. That plan is now being reviewed and should go into effect shortly.

Under this proposal, the state will require $150 to $200 in tank fees for a deductible of $5 to $50,000 for up to $1 million in coverage of corrective action and a $30,000 deductible for up to $1 million of insurance for third party claims. This is a good initiative on the part of Wyoming and I am hopeful that other states will adopt similar programs to fill the insurance needs of small businesses.

I look forward hearing the testimony of today's witnesses. I am also anxious to hear from our colleague on the committee, Senator Baucus, who as chairman of the Subcommittee on Environmental Protection of the Environment and Public Works Committee, recently held oversight hearings on this important issue and has introduced legislation to provide for guaranteed loans to small businesses to assist them in meeting the federal mandates. Perhaps their statements will provide some insight as to how we might solve the many problems small businesses are facing in relation to these regulations. Although Congress has been slow to react to this situation, we now have another year in which to enact reforms and I hope we will move forward with some constructive changes in an expeditious manner.

Senator BURNS. Thank you, Senator Pressler.

We have on our first panel this morning Mr. Ronald Brand who is Director of Office of Underground Storage Tanks with the Environmental Protection Agency, and Ms. Sally Narey who is from the Office of Advocacy, Small Business Administration, and Mr. Peter Guerrero, Associate Director for the Environmental Issues Resource, Community, and Economic Development Division of the GAO, General Accounting Office. And we welcome you folks here this morning, and we would start with the opening statements of Mr. Brand, if you could please.

STATEMENT OF RONALD BRAND, DIRECTOR, OFFICE OF UNDERGROUND STORAGE TANKS, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENVIRONMENTAL PROTECTION AGENCY, WASHINGTON, DC, ACCOMPANIED BY SAMMY NG, CHIEF, REGULATORY ANALYSIS BRANCH, OFFICE OF UNDERGROUND STORAGE TANKS

Mr. BRAND. Thank you, Mr. Chairman.

Good morning, Mr. Chairman, Members of the Committee. I appreciate the opportunity to meet with you to discuss EPA's Underground Storage Tank Program, especially the requirements for financial responsibility and their impact on small businesses.

Because this program covers 2 million tanks in 750,000 facilities, we have designed it to be implemented at the State and local level.

The environmental portions of the program are working. States have conducted 40,000 site investigations, initiated 25,000 cleanups, completed 8,000 cleanups, taken 15,000 enforcement actions and expended about $45 million from the trust fund so far.

As for the financial responsibility requirements, they were added by Congress in 1986. The law stipulates a minimum coverage of $1 million for tanks at facilities involved with refining, reduction or marketing activities. This level of assurance is to cover the cost of corrective action—that is, cleanup—and compensating third parties for bodily injury and property damage.

EPA's regulations implementing this law went into effect in January 1989. They provide for maximum flexibility on the part of tank owners in meeting the requirements of the law by allowing tank owners to choose from a variety of insurance mechanisms and time for the regulated community, the States and the insurance markets to respond by spreading out the compliance deadline over a 2-year period.

The financial responsibility requirements have caused us a great deal of concern which is shared by the members of the regulated industry and Members of Congress. The concerns revolve around the cost and availability of pollution liability insurance and the potential impacts of these requirements on small businesses, especially those in rural communities.

Last week, after a careful review of the availability of financial assurance for small businesses, we decided to allow additional time for them to comply. We intend to publish rules that will extend the final two compliance dates for 1 year.

Information collected by the Agency from the underground storage tank industry, the regulated community and the States indi-

cates that the owners and operators in the third and fourth compliance groups need more time to comply with these requirements. The Agency has learned that only about 2 percent of the third compliance group currently have insurance. These compliance groups generally represent the small gas stations and convenience stores most in need of an effective financial responsibility mechanism.

I believe that these measures will provide those groups with short-term relief from the statutory requirements, but it will not solve some serious underlying problems faced by many small businessmen that own tanks.

The principal issue confronting small businesses is this: How are they going to address all the existing leaks that no insurance policy will cover and raise the capital needed to test their tanks and to replace or upgrade them.

A fundamental problem stems from the fact that many tanks are simply not insurable. They are either too old, have leaked or are currently leaking. No insurer will insure these burning buildings.

However, the cost of insurance is only a small part of the bigger picture. By law, tank owners are liable for cleaning up releases from their tanks. The average cost for doing so has been going up, from around $75,000 in 1986 to over $150,000 today. While insurance may cover these costs for leaks that occurred after policies are issued, it will not, as I have said earlier, pay for existing leaks.

Many small businesses are hit by this double dilemma. They cannot pay for cleaning up all existing leaks, and they do not have the money to make the improvements to their tanks and sites that may make them insurable.

A partial solution to this dilemma has come from the States. Thirty-four States have developed State trust funds and for most small businesses, these State trust funds are the only feasible means of complying with Federal financial responsibility requirements. EPA has already approved seven State funds. Another 17 have been submitted and are currently under review.

While State trust funds may solve the problem of cleaning up leaks from underground storage tanks, they do not address the future problems that business, especially small business, face. Tank owners must test their tanks and replace the old, unprotected tanks with new, protected ones, activities which are not currently funded by State trust funds.

Just as insurance companies refuse to insure bad risks, lending institutions are reluctant to extend credit to small businesses with potentially large environmental liability. So, it is difficult for small tank owners to obtain the capital necessary to clean up leaks and upgrade their tanks.

Again, some States have begun developing creative and workable solutions to this problem, as Mr. Grassley indicated for Iowa. Eleven States have developed loan programs that provide money to small businesses in their States to test and replace their tanks.

I believe that these efforts and our decision to extend the final two compliance dates demonstrate that Administrator Reilly and EPA are both sensitive and responsive to the needs of small businesses. However, we cannot eliminate all of the economic impacts that stem from the decisions our society has made to protect our groundwater from leaking underground storage tanks. The States

have recognized the need to balance these priorities and their responses and financial commitments to this problem have been dramatic.

We look forward to working with you in order to ensure that the concerns for the small businesses in our country are met. Thank you for your time, and I will be happy to answer any questions that the Committee may have.

[The prepared statement of Mr. Brand follows:]

STATEMENT OF
RONALD BRAND
DIRECTOR
OFFICE OF UNDERGROUND STORAGE TANKS
OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE
BEFORE THE
COMMITTEE ON SMALL BUSINESS
OF THE
U. S. SENATE

MARCH 21, 1990

Good morning, Mr. Chairman, members of the Committee. I appreciate the opportunity to meet with you to discuss EPA's Underground Storage Tank Program, and the requirements for financial responsibility and their impact on small businesses. I will also tell you about how EPA is planning to address the problems small businesses may face in trying to meet the law's requirements. I would like to begin by acquainting you with the program.

As you may be aware, the Underground Storage Tank Program is one of EPA's newest programs, and in its design and implementation the Agency is forging an effective partnership with the states.

We think of the program as EPA's experiment in Environmental Federalism. From the outset we have recognized that, with approximately two million tanks and 750,000 facilities, this program had to be implemented at the state and local level, and not through a massive build-up of new staff in EPA. Therefore, we designed and are implementing a program which calls on EPA to act as a franchiser and the states and local agencies to be viewed as franchisees. This means all of our efforts are directed to supplementing and improving capabilities in those

state and local agencies. It also ensures that Federal and state dollars are directed most effectively to prevention and cleanup, rather than devoted to administrative overhead.

Achievements

I also appreciate the opportunity to share with you some of our accomplishments in the implementation of the tank program:

In October of 1988 we published final regulations that--

--ensure the use of sound, protective tank technology and management practices,

--require contamination from tanks to be cleaned up,

--require owners and operators to acquire the financial means to clean up contamination from their tanks, as mandated by the law, and

--establish practical and reasonable standards for the states to meet in carrying out the program.

In December of 1986, we began to carry out the provisions of the new Superfund law which created a federal Trust Fund to address the problem of leaking tanks, and in record time established cooperative agreements with 44 states. Today we have agreements with 48 states and 6 territories and the accomplishments to date under the Trust Fund are significant: The states have conducted 40,000 site investigations, initiated 25,000 clean ups, completed 8,000 clean ups, and taken 15,000 enforcement actions. In all, the states have spent about $45 million so far.

On the pollution prevention side of the program, all 50 states have basic legislation needed to carry out the program. This year we expect to receive applications from 14 states seeking formal approval of their programs. In the meantime, we have formal agreements with 46 states to operate the program as implementing agencies during the transition to fully-approved state programs. Thus the program is being carried out actively by the states--and these efforts include active enforcement of technical requirements, outreach on upcoming regulatory deadlines, inspection of facilities, and oversight of corrective action.

Twelve states and all ten of our Regional Offices have participated in a trial run of the state program approval process--an exercise we went through to identify how we can accelerate this process. Two states, New Mexico and Mississippi, have formally applied for state program approval. The Mississippi application will soon undergo public notice and comment. Our staff in EPA is highly competent and motivated. We have received the enthusiastic support of the states. It's an exciting program, and this committee shares in the success we have enjoyed so far.

Financial Responsibility and Small Business

As you know, the Agency was directed to address the problem of Underground Storage Tanks in November of 1984, when Congress passed the Hazardous and Solid Waste Amendments to RCRA. The financial responsibility requirements were added to the program, along with the provisions for the leaking Underground Storage Tank Trust Fund, when Superfund was reauthorized in 1986. The direction Congress gave the Agency concerning these financial responsibility requirements is very specific, and I would like to

provide a brief summary of the financial responsibility requirements in the law.

For tanks at facilities involved with refining, production, or marketing activities, the law stipulates a minimum coverage of one million dollars. This level of assurance is to cover the cost of corrective action--that is, clean up--and compensating third parties for bodily injury and property damage.

EPA's regulations implementing this law were promulgated in October, 1988 and they went into effect in January, 1989. They provide for maximum flexibility on the part of tank owners in meeting the requirements of the law by allowing:

- tank owners to choose from a variety of assurance mechanisms (insurance policies, state trust funds, letters of credit, corporate guarantees, surety bonds, and so on).
- time for the regulated community, the states, and the insurance markets to respond by spreading out the compliance deadlines over a two year period.

The financial responsibility requirements have caused us a great deal of concern, which is shared by members of the regulated industry and members of Congress. The concerns revolve around the cost and availability of pollution liability insurance, and the potential impacts of these requirements on small businesses--especially those in rural communities. Because of these concerns, we have consistently tailored our regulations to be as flexible as possible in order to minimize any unnecessary burdens and impacts.

We are currently developing two additional regulations that directly address the concerns we all share regarding the limited availability of assurance mechanisms.

First, in order to help local governments meet the financial responsibility requirements we are proposing another regulation. It would allow municipalities and other local governments to self-insure, much as larger private firms may do already.

Second, last week after a careful review of the availability of financial assurance to small businesses, we decided to allow additional time for them to comply. We intend to publish rules that will extend the final two compliance dates for one year.

Information collected by the Agency from the UST insurance industry, the regulated community and the states indicates that the owners and operators in the third and fourth compliance groups need more time to comply with the financial responsibility requirements. The Agency has learned that only about two percent of the third compliance group currently have insurance, and recent contractions in the insurance market have demonstrated that the availability of insurance is likely to be further constrained.

In extending the third and fourth compliance dates, the Agency desires to provide short-term relief to UST owners and operators to whom methods of financial assurance are not available. These compliance groups generally represent the small gas stations and convenience stores most in need of an effective financial responsibility mechanism. EPA continues to work together with Congress and the states to enable small businesses to remain economically viable while, at the same time, ensuring that mechanisms exist to pay for the cleanup of leaking tanks.

I believe that these measures will provide those who need it with short term relief from the statutory requirements, but it will not solve some serious underlying problems faced by many small businesses that own tanks.

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I would like to share with the committee some of my thoughts about these problems, and perhaps how they may be addressed.

The principal issue confronting small businesses is this: How are they going to address all the existing leaks (that no insurance policy will cover), and raise the capital needed to test their tanks and to replace or upgrade them?

A fundamental problem stems from the fact that the law requires financial responsibility for all tanks, and many tanks are simply not insurable. They are either too old (e.g. over 20 years of age), have leaked, or are currently leaking. No insurer will insure these "Burning Buildings".

So, while the number of insurers has increased (from two in 1986 to fourteen in 1990), it may not have increased the availability of insurance to all segments of the regulated industry. This is especially true for small businesses because they tend to have older tanks (which are more difficult or expensive to insure). In addition, many small businesses will not have sufficient revenues to cover the cost of the insurance which is available.

However, the costs of insurance are only a small part of the bigger picture. By law, tank owners are liable for cleaning up releases from their tanks. The average cost for doing so has been going up, from around $75,000 in 1986 to over $150,000. While insurance may cover these costs for leaks that occur after policies are issued, it will not, as I have said earlier, pay for existing leaks. It is very unlikely that most small businesses can afford these costs.

Many small businesses are hit by this double dilemma. They cannot pay for cleaning up all existing leaks, and they do not

have the money to make the improvements to their tanks and sites that may make them insurable.

A viable solution to this dilemma has come from the states. Thirty-four states have developed state trust funds, and for most small businesses, these state trust funds are the only feasible means of complying with the federal financial responsibility requirements.

EPA already has approved seven state funds (Alabama, Georgia, Iowa, Louisiana, Mississippi, Illinois, and Vermont) as acceptable mechanisms to comply with the federal financial responsibility requirements.

Another seventeen have been submitted and are under review. For purposes of enforcement, EPA deems these pending state funds as "approved."

While state trust funds may solve the problem of cleaning up leaks from underground storage tanks, they do not address the future problem that business (especially a small business) face. Tank owners must test their tanks, and replace the old, unprotected tanks with new, protected ones, activities which are not currently funded by state trust funds.

Just as insurance companies refuse to insure bad risks, lending institutions are reluctant to extend credit to small businesses with potentially large environmental liabilities. So it is difficult for small tank owners to obtain the capital necessary to clean up leaks and upgrade their tanks.

Again, the states have developed creative and workable solutions to this problem. Eleven states have developed loan

programs that provide money to small businesses in their states to test and replace their tanks. EPA is encouraged by these efforts, and we are encouraging more states to be innovative. We have recently awarded a grant to the Northeast Midwest Institute to explore the issues and options involved in developing state loan programs. We are also investigating what opportunities EPA may have to encourage lending institutions to make needed loans to these small business.

I believe that these efforts and our decision to extend the final two compliance dates demonstrate that Administrator Reilly and EPA are both sensitive and responsive to the needs of small businesses. However we cannot eliminate all of the economic impacts that stem from the decisions our society has made to protect our groundwater from leaking underground storage tanks. The States have recognized the need to balance these priorities, and their responses and financial commitments to this problem have been dramatic. We will continue to need their help and plan to support their efforts whenever we can. We are determined to encourage state programs that are responsive and flexible in meeting local needs, and we look forward to working with you in order to ensure that our concerns for the small businesses of our country are met. Thank you for your time and I will be happy to answer any questions that the committee may have.

Response to Questions from Senator Charles Grassley
Small Business Committee Hearing, March 21, 1990

Question 1

Part 1:

Small business owners are willing to comply with the Federal mandate. They are being penalized, however, due to the extreme expense of compliance and the lack of assistance available from the government to help them clean up and upgrade. Do you think the Federal government has any obligation in assisting underground storage tank owners in obtaining the financing necessary to fulfill the law?

Answer 1:

I do not believe the Federal government bears any specific obligation to assist tank owners in financing the cost of compliance with EPA's underground storage tank (UST) regulations. Unless Congress provides otherwise, the cost of compliance with environmental regulations is normally considered a cost of doing business, regardless of the nature of the business or whether the business is large or small.

However, EPA has recognized throughout the rulemaking process that the new UST requirements may present serious economic obstacles for many small businesses. In developing the new regulations, we made every effort to reduce the burden placed on small businesses. For example, we provided for phased-in periods of compliance with the UST regulations as follows:

Financial responsibility	-- 2-year phase in (currently being extended to 3 years)
Leak detection	-- 5-year phase in
Tank upgrade/replacement	-- 10-year phase in

In addition, the regulations often provide flexibility in the methods that UST owners and operators can use in meeting the requirements.

In 1986, Congress did acknowledge that Federal monies would be needed for cleanup and enacted the Leaking Underground Storage Tank Trust Fund. To date, EPA has entered into cooperative agreements with 55 States and territories, and has awarded over $ 110 million to States for UST cleanups.

Part 2:

With respect to providing incentives to lenders who finance tank upgrades, I am concerned about their potential liability under the underground storage tank program and under the Superfund Act. If a bank forecloses on a loan to a service station, can you tell me what their liability is under both of the programs I just mentioned?

Answer 2:

The body of case law that has evolved under the Superfund Act generally has held lenders who foreclose on a property and take legal title to be an "owner" of the property and, thus, subject to liability as a potentially responsible party under Superfund (assuming the property is contaminated). While no body of case law has yet evolved for underground storage tanks, we are inclined to believe that a lender who forecloses on a gas station would also be considered an "owner" under the underground tank program (Subtitle I of the Resource Conservation and Recovery Act). As an owner, a lender may be held liable for contamination caused by leaking USTs.

Part 3:

How can EPA "encourage" lending institutions to make loans, as you suggested in your statement? What about utilizing a guaranteed loan program? A new program could be created under the jurisdiction of the EPA or utilizing existing guarantee programs in other agencies to provide relief to small business.

Answer 3:

Lending institution concerns about their potential liability (as discussed above) may be one reason for their reluctance to make UST-related loans. One way to address this concern has been proposed by Congressman Luken in H.R. 3735. Section 502 (b)(1) of the House bill would amend the definition of tank owner to exclude commercial lenders who acquire legal title to a tank through foreclosure. We are now evaluating the extent to which such a provision, if adopted, could enhance the availability of funds needed by tank owners and operators to comply with EPA regulations (e.g., upgrading, tank replacements, etc.).

A Federal guaranteed loan program for underground storage tank improvements and upgrades is not favored by the Administration. Many businesses are affected by Federal statutes and regulations that require changes in operations, equipment and capital plant in order to better protect human health and the environment, as well as for other purposes, and we generally rely on market forces to supply the needed capital to comply with these requirements. A loan guarantee program could lower the risk of lending, thereby increasing

the availability of capital and often reducing the cost of borrowing. However, a Federal program of this nature would also subsidize an industry's cost of compliance with established national law and policy at increased cost to the taxpayer. It would also set an imprudent precedent for other businesses and industries that may be encouraged by the establishment of such a program to seek similar subsidization of their costs of compliance with other Federal law and regulation.

Part 4:

The President budgeted new money within your Agency and within the USDA for groundwater quality. Is there an overlap between these efforts? Could some of this money be spent on underground storage tank upgrades?

Answer 4:

EPA coordinates its groundwater efforts with USDA, the Department of Interior, the U.S. Geologic Survey and other appropriate Federal agencies. However, none of the monies associated with the groundwater protection program are intended for expenditure for upgrades to underground storage tanks.

Question 2

Currently, those who own between 1 and 100 tanks are required to have the same amount of liability coverage. It has been suggested to me that tiered financial responsibility requirements for smaller outlets may help ease the enormous expense of liability insurance for these owners. What is your opinion of this recommendation?

Answer 2

It is EPA's understanding that an insurance premium is based on the following factors: the risk that is being insured, the expected claim (or loss), and to much lesser extent the cost of writing the coverage (commissions, overhead, etc.). The risk of an underground storage tank is based primarily on the age and the material of construction. Insurers, based on past claims experience, are using $150,000 as the expected loss figure. Lowering the required amount of coverage (from $1 million to say, $500,000) may lower the premium cost by only 10%. Lowering the required amount of coverage, however, does not increase the insurability of a tank.

Question 3

In Iowa, the demand for businesses conducting geological assessments, clean-up operations, and tank upgrades has greatly increased due to the demand. It appears that some may be exploiting this situation by driving up prices. Has EPA had any complaints regarding this situation? What do you believe could be done about this exploitation?

Answer 3

EPA has had no complaints about unfair pricing by firms specializing in assessments, upgrades, and cleanups for underground storage tanks.

While there is nothing that EPA can do directly to affect the rates that are charged for these services, as part of EPA's efforts to improve performance in UST activities nationwide, we have undertaken projects designed to reduce the cost of conducting certain UST-related activities. For example, we have worked with industry in an attempt to evaluate and promote techniques for analyzing UST contamination in the field, rather than using conventional sampling and laboratory analysis which is more expensive and time consuming. In another instance, we have also been working with industry to use innovative UST clean-up techniques as an alternative to the conventional appproach of pumping and treating ground-water. These and other improvements should result, over the long term, in lesser costs being incurred for UST activities than would otherwise be the case.

Senator BURNS. Thank you, Mr. Brand.

Ms. Narey, please, Chief Counsel for the Office of Advocacy, Small Business Administration.

STATEMENT OF SALLY B. NAREY, GENERAL COUNSEL AND ACTING CHIEF COUNSEL, OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION, WASHINGTON, DC

Ms. NAREY. Thank you, Mr. Chairman.

I might point out that I am also the General Counsel at the SBA, as well as the Acting Chief Counsel for Advocacy.

I want to thank the Committee for the opportunity to address the issues raised by Chairman Bumpers and Senator Boschwitz in their recent letter to Administrator Engeleiter. At the request of the Administrator, it is my privilege to appear before this Committee today on behalf of the Agency. We believe that focus of this hearing is of great interest to small businesses throughout the United States.

The SBA has heard from small businesses which own or operate underground storage tanks concerning difficulties confronting them in complying with the regulations of the Environmental Protection Agency. Small businesses have had problems with the technical standards and financial responsibility requirements of the regulations, including the requirement of securing adequate insurance coverage.

They have also described problems in obtaining financing, which has arisen for them and their lending institutions under the various Federal environmental statutes.

In addition, small businesses have expressed complaints about similar problems raised by other related Federal laws and by numerous State environmental statutes.

These issues are of particular concern to the SBA because they directly impact upon our programs of financial assistance to small business. It is clear that solutions are urgently needed.

EPA regulations regarding underground storage tanks address an important environmental concern: Prevention and correction of leaks of petroleum and other chemicals from over 2 million underground storage tanks nationwide. These regulations include technical standards for leak detection, tank upgrades, and new tank standards, as well as financial responsibility requirements.

The EPA financial responsibility rules are having an adverse impact on small petroleum marketers and other small businesses because of the cost and unavailability of insurance. According to a recent study, less than half of the medium-sized petroleum marketers have acquired insurance. Petromark, the second largest insurer of petroleum marketer tanks, is currently unable to serve new clients and may provide only 60-day renewals to its current clients. Insurance is thus very difficult to acquire for hundreds of thousands of small petroleum oriented businesses.

The SBA applauds EPA's recent action to extend the deadlines for compliance with the financial responsibility requirements for the two smallest categories of facility owners. This additional time will afford small businesses greater opportunity to obtain insurance and access to State funds. EPA is working with the States to

solve the dilemmas faced by underground storage tank owners and operators through the development of State fund and loan programs.

SBA also recognizes the problems that owners of underground storage facilities are facing, and we are attempting to help in certain cases.

I would like to just tell you a little bit about one effort that is designed to confront these problems that has been developed with the State of Oregon in cooperation with our Portland office. That State has a Grant/Loan Guarantee Program for small motor fuel retail outlets which provides financing for tank upgrade and replacements and cleanup costs. The upgraded facility presumably will qualify for reasonably priced insurance.

Under this program, the Oregon Department of Environment offers a loan guarantee of 80 percent, not to exceed a gross amount of $64,000, to small businesses for soil cleanup, upgrading or replacement. SBA has proposed to refinance the loans made by Oregon under the SBA Guaranteed Loan Program once the small businesses have cleaned up their facilities with the proceeds of State financing. In this way, we believe we will be able to help the State by assisting additional small businesses through leveraging of the States funds.

Oregon intends to target the use of its money toward gas stations located in rural areas where availability of near gasoline facilities may otherwise be difficult. While gasoline availability is important to the local population and businesses, it is particularly crucial in order to maintain and improve the tourist economy in eastern Oregon. Under this program, Oregon will provide up to $13.8 million in loan guarantees, enough to upgrade 2,000 of the 3,000 independently owned and operated retail petroleum facilities. With SBA's involvement, Oregon should be able to finance additional facilities.

Mr. Chairman, you have requested that the SBA comment on two bills which are germane to the issue of financial responsibility: Your bill, S. 1560, and Senator Baucus' bill, S. 2175. We are studying both of these bills and commend you on your attention that you have paid to small businesses in this area. We would like to study them further and discuss them and their impact with SBA and certainly work with you in this effort. We hope to transmit our views on these bills to you shortly.

The Chairman also asked us to address the question of lender liability before this hearing this morning. This is a very important issue, not only for commercial lenders, but also for the SBA. As you know, among those persons who may be held liable under Federal laws for the cleanup costs of hazardous waste sites or leaking underground storage tanks are the owners or operators of that site. The application of these provisions in the lending context has caused great concern among lenders to small businesses and has also diminished interest in making financing available. There has been reluctance by lenders to extend loans to small businesses out of the fear that if a small business should fail and its lender take possession of the debtor's assets through foreclosure, settlement or a bankruptcy proceeding, the lender, as an owner, is likely to be required to bear the costs of any necessary environmental cleanup.

We are concerned that this reluctance will result in great harm to small businesses with underground storage tanks.

Because of this potential liability, Mr. Chairman, a prudent lender will often request an environmental audit of the potential borrower's property upon submission of a loan application. This can cost several thousand dollars. Small businesses, certainly those seeking SBA financial assistance, generally do not have sufficient funds to incur the cost of such audits and may be deprived of the opportunity for financing.

On the other hand, if lenders finance these audits, it is likely that the interest rates on loans to small businesses will rise to offset the cost. If this should occur, some otherwise creditworthy small businesses may simply not be able to bear the costs of higher periodic loan payments and, as a result, may not be able to afford financing.

In other areas, small businesses, especially fledgling enterprises, are likely to benefit from their lender's financial and entrepreneurial advice after a loan has been made. The lenders also want to keep an eye on their investments. Yet, out of concern that they may be viewed as participating in the day-to-day operation of the borrower to such a degree as to be considered an owner or operator liable under the law, lenders may determine that it is best not to offer advice to an inexperienced small business. If unable to protect their investments, these lenders may simply decide not to extend financing.

Finally, many small businesses have little collateral beyond land, buildings, machinery, and equipment. But those are the very items of collateral most likely to be tainted if hazardous waste is or becomes present on the property. Once again, a lender may seek to avoid involvement in a loan to a small business for fear that the collateral obtained to secure the loans is likely to become tainted and ultimately become valueless or give rise to cleanup costs should the lender take ownership of the collateral. As you are aware, cleanup liability can be imposed without any degree of fault on the part of the lender. This potential outcome may be sufficient to dissuade many lenders from ever getting involved in loans to small businesses.

Let me just briefly point out to you what the implications of this are for the SBA. As you know, if a small business cannot obtain a loan from a bank, it may seek an SBA guaranteed or direct loan. SBA does not have the expertise or funds to conduct environmental audits to determine the propriety of Agency involvement in a particular loan transaction. Similarly, if a participating lender asks SBA to honor its guarantee and buy its share of a guaranteed loan, we do not have the ability to determine if the bank has acted prudently in its treatment of environmental issues, nor are we able to discern if the collateral for the loan has become tainted during the life of that loan. Finally, we would note that at least one court has raised the issue of potential cleanup liability as a result of advice provided a borrower by an SBA employee.

We are currently faced with potential cleanup liability once we buy in collateral at a foreclosure sale upon default of an SBA borrower. When we honor a guarantee, the collateral for the loan is assigned by the lender to SBA, and either the Agency or the

lender, acting at the request of the Agency, proceeds to liquidate the collateral. When we liquidate the collateral, we proceed on its own. Often it is deemed appropriate by us to buy in the collateral at a foreclosure sale in order to hold the property in a custodial manner for future resale to minimize the Government's loss upon default.

Under Federal environmental statutes, it is possible that such buy-ins make SBA the owner of the subject property and, as a result, potentially liable for cleanup costs. Even though SBA is a lender of last resort, thereby incurring more risks than private lenders, we do attempt to minimize the Government's losses upon a borrower's default. If the Agency is found to be a party responsible for cleanup costs, that only adds to Federal liabilities.

Mr. Chairman, in conclusion I would like to point out that the problems I have outlined are very real. We are currently finding ourselves involved in hazardous waste sites throughout the country as a result of our loan programs. In one situation, where we obtained collateral through foreclosure, we are now being sued by a State environmental agency. We now face the possibility of spending unknown amounts of money for site cleanups simply because of foreclosure actions taken to minimize the Government's loss following the default of a small business borrower.

We have apprised EPA of our concerns, and we are very pleased to have had the opportunity to present them to you today. Thank you.

Senator BURNS. Thank you, Ms. Narey.

We have to go vote, and you may have a new chairman whenever we come back. So, if we could just take a little recess and relax a little bit and have a cup of coffee. That proud one light is displayed on the clock. Thank you.

[Recess.]

STATEMENT OF HON. DALE BUMPERS, A U.S. SENATOR FROM THE STATE OF ARKANSAS

The CHAIRMAN [presiding]. Let me apologize to all the witnesses this morning. It is just a very difficult one for all the Senators. We have this Clean Air bill up and lots of controversy here, and we are just running back and forth. We will try to keep some continuity to it. Senator Boschwitz will be here momentarily. I will Chair this hearing until 11, at which time I am going to have to depart.

Ms. Narey, you have just finished your testimony?

Ms. NAREY. Yes, Senator.

The CHAIRMAN. Mr. Guerrero. Where is he?

Mr. DYCKMAN. He is not back yet. I am Larry Dyckman of GAO. Could we wait another minute?

The CHAIRMAN. Certainly.

Mr. DYCKMAN. Thank you.

The CHAIRMAN. We have discommoded all of you enough. We can certainly wait for another minute or two on him.

Senator KASTEN. Mr. Chairman.

The CHAIRMAN. Senator Kasten.

STATEMENT OF HON. ROBERT W. KASTEN, JR., A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KASTEN. While they are getting organized, I would like to just say, Mr. Chairman, that I appreciate the fact that we are holding these hearings. I think it is important to recognize the importance of these issues. This is an issue that particularly has been affecting the smaller businesses in Wisconsin, and I would like to ask unanimous consent to put a statement in the record at the appropriate place at the onset of these hearings.

The CHAIRMAN. Without objection, so ordered, and we will put that in preceding the testimony of the hearing.

Senator KASTEN. I thank you.

The CHAIRMAN. Incidentally, you will appreciate this. I live in a little town in western Arkansas, and Little Rock is in the middle of the State. And I drive up an interstate, and I usually pull off the interstate and go to a little service station where I have always stopped to get gas all the years in the Senate because it is cheaper. And last Sunday afternoon I pulled up there and I saw all this earthwork that had been going on where they have obviously put in new tanks, and so I just went on. I was afraid to go in. [Laughter.]

Could somebody step outside and see if Mr. Guerrero——

Mr. DYCKMAN. If you would like, I could present the statement for him.

The CHAIRMAN. Would you please? If he comes in, we will clamp you down and put him on.

STATEMENT OF PETER F. GUERRERO, ASSOCIATE DIRECTOR, ENVIRONMENTAL PROTECTION ISSUES, RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE, WASHINGTON, DC, ACCOMPANIED BY LAWRENCE DYCKMAN, ASSISTANT DIRECTOR, ENVIRONMENTAL PROTECTION ISSUES, RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION

Mr. DYCKMAN. Good morning, Mr. Chairman. My name is Larry Dyckman. I am an Assistant Director at the General Accounting Office.

Thank you for the opportunity to testify on the ability of petroleum tank owners to comply with Federal financial responsibility requirements. Mr. Chairman, I will summarize the written statement that I have submitted to the Committee.

Two years ago, we reported on the problems small businesses were expected to have complying with these financial responsibility requirements.

The CHAIRMAN. You have just been preempted, Mr. Dyckman. [Laughter.]

Mr. DYCKMAN. I am happy to turn it over to my boss.

The CHAIRMAN. Thank you for the effort. [Laughter.]

Mr. Guerrero, we have anxiously awaited your appearance here. So, please proceed.

Mr. GUERRERO. Thank you, Mr. Chairman. My apologies.

Two years ago, as Mr. Dyckman started to say, we reported on the lack of insurance for small business and the problems that we

expected they would have complying with these requirements. We recommended a phase-in of the financial responsibility requirements to allow time for insurers to develop tank programs and for more States to develop trust funds as alternatives.

In October 1988, EPA published its final regulations requiring all petroleum tank owners to maintain evidence of financial responsibility. EPA grouped firms owning underground petroleum tanks into four size categories and phased in its financial responsibility requirements, as we had recommended, giving owners up to 2 years to comply.

Last week EPA announced that it would amend its regulations to extend by 1 year the compliance deadlines of the last two categories, the smallest firms. We agree with EPA's postponement decision. Currently there does not appear to be a reasonable assurance that smaller firms can comply with the financial responsibility requirements.

First, while some 15 insurers are now offering varying forms of liability insurance, many are new to this market and have unproven track records.

Second, larger, well-established firms are curtailing their underwriting. One of the most active insurers, Petromark, recently announced that it was suspending new insurance sales pending a financial review of its reserves, and another, Federated, is suspending new sales in some States with tank trust funds. While tank insurance was generally available on some terms to many larger businesses, many small firms were not likely to qualify for insurance. When such firms did qualify, it was expensive or did not always meet the regulatory requirements. Of the 10 insurance companies we contacted, only two company representatives said that private tank insurance is currently available and affordable to smaller firms. As a result, many of these firms will need to rely on the State trust funds for financial responsibility.

At this time, 34 States have funds, and EPA expects that additional States will have funds by October 1991, the new deadline for the smallest tank owners. EPA has given final or temporary approval to about 23 of these funds. So, the tank owners can use them to satisfy, at least in part, the financial responsibility requirements. Most officials in States without approved trust funds told us they plan to submit those funds to EPA for approval. Nevertheless, at present in more than half of the States, tank owners cannot rely on State funds to help them satisfy the financial responsibility requirements.

We also found that two factors limit the usefulness of State funds. First many States place conditions on the eligibility of tank owners to use the funds to meet financial responsibility requirements, such as requiring owners to be in compliance with the technical standards and smaller firms may not have the resources to upgrade their facilities to meet these standards.

Second, most State funds will pay costs only above a specified deductible, and some limit or exclude third party coverage. Therefore, tank owners will have to supplement the State fund coverage usually with insurance.

But in the last few weeks, prior to EPA's extension of the compliance dates, we asked tank program officials from 45 States whether

they thought that smaller firms would be able to comply with the 1990 deadlines. The majority of the officials said that half or more of these firms would not be able to comply. Even in States with EPA approved trust funds, officials were not optimistic.

During the next 12 to 18 months, EPA will need to monitor closely the conditions in the insurance market and the development of State trust funds so that it can act appropriately as the extended deadlines approach. Several factors indicate that uncertainty over the availability of small tank owners to comply may persist.

First, most States still do not have EPA approved trust funds, and it is uncertain as to how many will obtain approval by the new 1991 deadlines.

Second, a very small percentage of smaller firms are now insured. The 10 insurers we contacted, including some of the largest, reported having issued only some 3,600 policies to small businesses while EPA estimates there are 225,000 owners and operators in this category. Most of the insurers we talked with thought that smaller firms could not comply with the financial responsibility regulations for 1 or more years or could make no estimate at all as to when compliance would be possible.

In addition, sometimes insurers require that owners upgrade their tanks to qualify for coverage. This can pose, as indicated today, financial hardships for the smaller tank owners. State or Federal programs that could help tank owners upgrade tanks are limited or nonexistent. Of the 45 States that we contacted, 30 had no plans to offer such assistance.

I would like to turn now to the subject of enforcement. Recently EPA began to check on the compliance of the larger firms with the financial responsibility requirements. This effort is limited to 13 States. At this time EPA does not intend to actively check tank owners compliance nationwide, and has no tank inspectors in its regional offices. It plans to rely mainly on State referrals of violations, although according to EPA officials, the States have also assigned the enforcement a low priority. Even if financial responsibility violations are uncovered, EPA generally does not plan to penalize firms.

We believe that while it is reasonable to be flexible in penalizing firms that cannot comply with the regulations, despite their best efforts, the law should be enforced when it is willfully disregarded by firms for whom the deadlines have already become effective. Tank owners who have incurred the expense of compliance should not be placed at a disadvantaged with competitors who can comply but do not.

In closing, Mr. Chairman, I would like to summarize that there is just too much uncertainty today in terms of the availability of insurance and the coverage by State trust funds. EPA has chosen to do the right thing by postponing for 1 year the requirements for the smaller firms. We believe that such postponement does not result in undue risk to the environment, and it is better than keeping the existing requirements on the books and looking the other way when it comes to enforcing them.

EPA, however, does need to closely monitor the developments over the next 12 to 18 months as we are not entirely optimistic that things will change that dramatically in that period of time.

Generally, as Senator Baucus observed earlier today, the cart has been put before the horse. We believe that once upgrades are made, firms should be able to find insurance. However, insurance requirements, as you know, go into place before the upgrades. The catch 22, as we have heard today, is that small firms may not have the resources to upgrade and some financial assistance may be necessary to help those firms.

Thank you.

[The prepared statement of Mr. Guerrero follows:]

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Underground Petroleum Tank Owners' Ability to Comply With Federal Financial Responsibility Requirements

Statement of
Peter F. Guerrero, Associate Director
Environmental Protection Issues
Resources, Community, and Economic
Development Division

Before the
Committee on Small Business
United States Senate

GAO/T-RCED-90-48

Mr. Chairman and Members of the Committee:

The Superfund Amendments and Reauthorization Act (SARA) of 1986 required that we report to the Congress on whether owners of underground petroleum storage tanks could obtain liability insurance or meet the act's financial responsibility requirements by some other method.[1] These requirements are intended to ensure that tank owners have the resources to clean up any tank leaks and compensate anyone harmed by the leaks.

Our report, issued in January 1988, concluded that insurance for underground petroleum tanks was generally unavailable and that the alternatives to insurance permitted by the law, such as self-insurance, were not practical or available for small businesses.[2] Because thousands of tank owners might not have been able to meet the deadline for demonstrating financial responsibility under consideration at the time, we recommended that the Environmental Protection Agency (EPA) phase in the requirements over a more realistic timetable. We thought that a gradual approach might permit the development of a more active insurance market and other financial assurance methods, such as special state funds.

In a regulation issued after our report, EPA grouped firms owning underground petroleum storage tanks into four categories and phased in its financial responsibility requirements over 2 years starting from the regulation's issuance in October 1988. On March 14, 1990, EPA announced that it will amend the regulation to extend by one year the compliance deadlines for two categories of smaller

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[1]These requirements can be satisfied by either the tanks' owners or operators. For convenience, we refer only to tank owners in this statement.

[2]Superfund: Insuring Underground Petroleum Tanks (GAO/RCED-88-39, Jan. 15, 1988).

firms.[3] Category 1 firms, which are very large petroleum marketing firms, had to comply by January 1989; category 2 firms, which include large and medium-sized firms, had until October 1989. Under EPA's newly announced rule, Category 3 firms, which comprise smaller firms, will have until April 1991, and category 4 firms--which include very small petroleum marketing firms; most tank facilities that do not produce, refine, or market petroleum; and all local governments--will have until October 1991 to comply. We are pleased to be here today to discuss our report and update its findings to the extent we could in the time available.

OVERVIEW

Because the category 1 firms generally can self-insure, they did not have problems complying with EPA regulations. Many of the estimated 500 firms in the second category appear to have satisfied the financial responsibility requirements through insurance or by coverage from special trust funds established by some states. However, it is uncertain whether a sufficient amount of affordable commercial insurance or sufficient state trust funds are available for owners in the last two categories--especially the many thousands of small businesses. Recently, one of the largest suppliers of tank insurance announced that it is suspending the sale of new policies, and another is reducing its area of operations. In addition, most states either have not submitted for EPA approval trust funds to help tank owners establish financial responsibility or have created funds that only partially satisfy the regulations' coverage requirements.

Firms that do not meet the financial responsibility requirements are potentially subject to large federal fines. Noncompliance, according to industry representatives, also violates

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[3]GAO had suggested this action in testimony on February 20, 1990, before the Subcommittee on Environmental Protection, Senate Committee on Environment and Public Works (GAO/T-RCED-90-29).

tank owners' contracts with creditors and suppliers, which require them to operate in accordance with all laws and regulations. Additionally, noncompliance creates a risk that owners may not be able to pay for damages to the public and the environment caused by tank leaks. Therefore, the issue of when to impose the financial responsibility requirements mandated by law is important.

EPA decided not to postpone the regulations or suspend enforcement for category 2 tank owners but last week announced a decision to postpone the category 3 and 4 deadlines for one year. Currently, there does not appear to be reasonable assurance that category 3 and 4 firms can meet the financial responsibility requirements. We therefore agree with EPA's postponement decision. During the extension period, EPA needs to increase its collection of information on the cost and availability of insurance and the consequences of noncompliance on the business relationships of tank owners. EPA also needs to continue to work with the states so that more of them can use state funds to help tank owners in categories 3 and 4 satisfy federal financial responsibility rules in the future. At the same time, we think EPA needs to ensure, through a more active enforcement program, that category 1 and 2 firms comply with the federal rules.

BACKGROUND

EPA estimates that nationwide there are up to 2 million petroleum underground storage tanks at three-quarters of a million facilities, such as gas stations, utility companies, or car dealerships.[4] EPA believes that hundreds of thousands of these tanks have corroded and are leaking. About 8,000 cleanups have been completed since EPA began making cleanup grants to states in mid-1987, and another 24,800 cleanups are underway. Leaking tanks

[4]According to EPA, owners have reported 1.7 million underground petroleum storage tanks to state regulatory officials, but EPA estimates that there are hundreds of thousands of unreported tanks.

can contaminate groundwater--a drinking water source for half of our nation--and cause fires or explosions. To protect against such risks, the Hazardous and Solid Waste Amendments of 1984 required EPA to develop regulations to prevent, detect, and correct tank leaks. Issued in September 1988, these regulations set forth spill cleanup procedures and standards for tank construction and operation, to become effective over a 10-year period.

SARA subsequently directed EPA to issue regulations stipulating a minimum financial responsibility requirement of $1 million per occurrence for owners of underground petroleum tanks.[5] Noncompliance could subject tank owners to fines of up to $10,000 a day. However, SARA allows EPA to suspend enforcement of financial responsibility requirements for 6-month periods for individual classes of owners if EPA determines that insurance and other financial assurance methods are generally unavailable and progress is being made toward meeting financial responsibility. Additionally, the law states that in developing regulations, EPA may consider the impact of any rules on small businesses.

In October 1988, EPA published final regulations requiring all petroleum tank owners to maintain evidence of financial responsibility of $1 million or $2 million, depending on the number of tanks they own.[6] These regulations were to be phased in over 2 years by size category of tank owner; however, EPA has recently decided to extend the phase-in period to 3 years.

Under the law, states can with EPA approval operate and enforce underground storage tank programs "in lieu of" the federal

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[5]SARA also gave EPA discretion to set lower limits for low-volume tank facilities, referred to as nonmarketers, that do not produce, refine, or market petroleum.

[6]EPA originally published proposed financial responsibility regulations in April 1987, with implementation to have taken effect about June 1988.

program. To obtain approval for these programs, states must (1) establish technical and financial responsibility requirements at least as strict as the federal government's and (2) provide for the enforcement of these requirements. EPA has one state program under consideration (Mississippi's) and expects to approve about 13 others over the next 12 months.

GAO'S REPORT TO THE CONGRESS

In January 1988 we reported that uncertainty about potential losses had kept insurance companies out of the underground tank market. Two sources provided virtually all of the tank insurance sold in the United States in the 3 years prior to our report, and one of them had withdrawn from the market midway through 1987. The two firms had insured about 14 percent of U.S. tanks, mostly those owned by bulk sellers of petroleum products, known as jobbers. We also found that the alternatives to insurance permitted by the law, such as self-insurance, letters of credit, and surety bonds, were not feasible for most tank owners. Only the largest firms, such as the major oil companies and national bus companies, could use these alternatives because these methods were (1) expensive for smaller firms, (2) did not transfer risk, or (3) required more assets to be pledged than the average tank owner could afford. At the time of our review, relatively few states had established funds to clean up tank leaks, although we said that these funds might be the only hope for small firms to establish financial responsibility.

We related the insurance experience of eight tank owners of various sizes from around the country. Six of these firms had insurance expiring in 1988, and they were having extreme difficulty in replacing it; the other two had no insurance. Some companies with insurance reported increasing rates and declining coverage on their policies.

Our report recommended that EPA phase in the financial responsibility requirements to allow time for insurers to develop tank programs and tank owners to pursue insurance alternatives. We also recommended that EPA speed up implementation of the tank construction and operation requirements, which we stated were most important for protecting the public and the environment.

THE INSURANCE MARKET AND DEVELOPMENT OF STATE FUNDS

Since our January 1988 report, two developments have made it possible for more tank owners to comply with the financial responsibility requirements. First, more insurance companies have started offering tank coverage. Second, more states have created funds to pay for damages caused by leaks from tanks and are using these funds to help owners meet EPA's financial responsibility regulations. Nevertheless, many small businesses may not be able to obtain insurance or state trust fund coverage.

According to EPA, about 15 sources are now offering liability insurance for underground petroleum tanks, including 1 company that specializes in insuring owners with 25 or fewer tanks. However, one of the most active insurers (Petromark) recently announced that it is suspending new sales pending a review of its reserves, and another insurer (Federated) is suspending new sales in some states with tank funds.

Within the last 6 months, we discussed tank owners' insurance prospects with representatives of EPA, the Small Business Administration, insurance companies, state agencies, and industry. These officials generally said that tank insurance was available on some terms to many businesses. According to EPA and industry representatives, the very large firms already required to meet the regulations have complied through self-insurance. In addition, an official of an association representing small gasoline dealers said

that insurance was available to these dealers, although he did not know how many actually had it. However, industry representatives said that available insurance was expensive, did not always meet regulatory requirements, or was sometimes offered by companies with unproven track records. Of the 10 insurance companies we contacted, only two company representatives said that private tank insurance is currently available and affordable for both category 3 and 4 firms. When we spoke with representatives of the largest insurers before EPA's announcement of postponement, they told us they favored postponing the category 4 October 1990 deadline.

Representatives of the groups we interviewed said that many small firms, including those not in the business of selling petroleum, such as farmers or operators of delivery vehicles, were not likely to qualify for insurance. A Small Business Administration official told us that these small firms are not insurable at present because the firms know little about tank technology or risk management, and there was no actuarial history for their tanks. According to an EPA official, these firms, many of which have older, less safe tanks, will need to rely on the state trust funds for financial responsibility.

In January 1988 we reported that 12 states had established funds as of August 1987. The situation has improved. According to EPA, at this time, 34 states have created trust funds to pay for cleanups and in many cases compensate victims of leaks. EPA has given final or conditional approval to about 23 state trust funds so that tank owners can use them to satisfy, at least in part, the financial responsibility requirements. EPA expects that it will approve additional state funds in time for the deferred financial responsibility deadlines. EPA plans to use the additional time made available by the extension to work with the states in developing trust funds. It should be noted that even with state trust funds, some tanks are in such poor condition that they will not qualify for coverage under the funds.

Many states place conditions on the eligibility of tank owners to use the fund to meet financial responsibility requirements, such as requiring owners to be in compliance with technical tank standards. In addition, most state funds will pay costs only above a specified deductible, and some limit or exclude third-party coverage. Therefore, tank owners will have to supplement the state fund coverage with insurance or other financial responsibility methods.

Within the last few weeks, prior to EPA's extension of the compliance dates, we asked underground storage tank program officials from 44 state governments plus the District of Columbia whether they thought that category 3 and 4 firms would be able to comply with the 1990 deadlines. The majority of the officials said that half or more of the category 3 and 4 firms would not be able to comply. Even in states with EPA approved trust funds, officials were not optimistic about owners' compliance. Officials in 9 of 21 states with trust funds we spoke with thought half or more of the category 3 owners would not be able to comply, and officials in 13 states said the same thing about category 4 firms.

In view of the status of state trust funds and the condition of the insurance market, we believe that EPA's decision on the financial responsibility deadlines was appropriate.

NEED TO MONITOR FUTURE DEVELOPMENTS

During the next 12 to 18 months, EPA will need to monitor closely conditions in the insurance market and the development of state funds so that it can act appropriately as the extended deadlines approach. Several factors indicate that uncertainty over the ability of small tank owners to comply with the financial responsibility requirements may persist. First, most states still

do not have EPA-approved trust funds. It is uncertain how many will obtain approval by the new 1991 deadlines. Second, a very small percentage of category 3 and 4 firms are now insured. The 10 insurers we contacted reported having issued about 3,600 policies to category 3 and 4 firms, while EPA estimates that these two categories include 225,000 owners. Third, because many of the insurers offering pollution liability insurance to underground petroleum storage tank owners are new to this market, the extent to which they will service the tank owner population remains to be seen. Most of the insurers we talked with thought that smaller firms could not comply with the financial responsibility regulations for 1 or more years or could make no estimate at all. In addition, some insurers require that owners upgrade their tanks to qualify for coverage. This will pose financial hardships for some smaller tank owners. State and federal programs to help tank owners upgrade tanks are limited or non-existent. Thirty of 45 states we contacted had no plans to offer such assistance.

The need for close monitoring is also indicated by the differences between the abilities of category 3 and category 4 firms to meet requirements. The state officials we contacted were more optimistic about the compliance prospects of category 3 firms than category 4 firms.

In addition to monitoring the availability of insurance and the development of state financial assistance programs for small businesses, EPA needs to address another issue in advance of the 1991 deadlines. Representatives of petroleum marketers raised a possible problem with the financial responsibility regulations that could not be resolved by flexible enforcement policies or a suspension of enforcement. According to the representatives, tank owners who cannot establish financial responsibility will violate contracts with their creditors and suppliers because such agreements commonly require that the owners comply with all laws and regulations to qualify for further credit or supplies. A

suspension of enforcement would remove the threat of government penalties but not cure the contractual problem. EPA officials said that this situation may represent a real threat to tank owners but that EPA did not consider this issue when it developed the regulations.

Recently, following a recommendation we made to the EPA Administrator, the agency has begun to collect information on insurance availability. But this data collection effort is limited. For example, it covers only about half of the insurance companies now writing tank insurance and does not provide much information on the insurance market in individual states. In addition, EPA has little information on the risks of noncompliance to owners' credit and supply arrangements. We think that EPA needs to actively collect more information so that it can determine whether financial responsibility requirements should be imposed in 1 year.

MORE ACTIVE ENFORCEMENT OF THE FINANCIAL RESPONSIBILITY REQUIREMENTS NEEDED

EPA has assigned a low priority to enforcement of the financial responsibility requirements. EPA's regions are working with 13 states to check on the compliance of category 1 and 2 firms in these states. But at this time EPA does not intend to actively check tank owners' compliance nationwide and has no tank inspectors in its regional offices. It plans to rely mainly on state referrals of violations, although, according to an EPA official, the states have also assigned enforcement a low priority. Even if financial responsibility violations are uncovered, EPA does not plan to penalize a firm unless, for example, its tanks are leaking and the firm cannot or will not clean up the leaks.

We believe EPA should adopt a more active enforcement strategy. While it is reasonable to be flexible in penalizing

firms that cannot comply with the regulations despite their best efforts, the law should be enforced when it is willfully disregarded by firms for which deadlines become effective. Tank owners who incur the expense of compliance should not be placed at a disadvantage with competitors who can comply but do not. EPA should monitor and enforce compliance in states where it is possible for owners to obtain insurance or qualify for state trust fund coverage, and the agency should encourage states to do the same. In light of the extended deadlines, it will be especially important for EPA to stress the enforcement of its standards for safe tank management.

CONCLUSIONS

In closing, Mr. Chairman, too much uncertainty exists about the insurance market for smaller firms with underground tanks and too few states have approved trust funds to reasonably ensure that category 3 and 4 firms can generally comply with the financial responsibility requirements at this time. We support EPA's decision to postpone the effective date for deadlines on category 3 and 4 firms until 1991. This will give states more time to establish trust funds and EPA more time to assist states in developing these funds and to better assess the entire financial responsibility situation. In preparation for the 1991 deadline, EPA will need considerably more information on the availability and cost of insurance, on state financial assistance programs, and on the effects of regulatory violations on the relations of tank owners with creditors and suppliers.

In addition, to promote compliance with the law and more balanced competition among tank owners in categories 1 and 2, there should be reasonable enforcement of these financial responsibility requirements. The low priority EPA has assigned to enforcement could lead tank owners to believe that compliance with the requirements is unimportant.

In October 1989 we testified on underground storage tanks before a subcommittee of the House Small Business Committee.[7] In that testimony, we recommended that the Administrator, EPA,

-- determine what regulatory course to follow by (1) actively monitoring the cost and availability of tank insurance and other financial responsibility mechanisms and (2) evaluating how noncompliance will affect tank owners' credit and supplies and

-- plan and implement a strategy to more actively enforce the financial responsibility requirements.

Although EPA has taken some actions to address our recommendations, it has not fully implemented them.

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Mr. Chairman, this concludes my prepared statement. I will be happy to respond to questions that you or members of the Committee may have.

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[7] Ability of Underground Petroleum Storage Tank Owners to Comply With Federal Financial Responsibility Requirements (GAO/T-RCED-90-9, Oct. 31, 1989).

The CHAIRMAN. Thank you very much, Mr. Guerrero.

Mr. Guerrero, since you testified last and I heard all your testimony, let me just direct the questions at you.

In here you talk about most of these people cannot afford it. What is the cost?

I want to also be sure we are clear on one thing. Class 3 is over 100 tanks. Is that correct?

Mr. GUERRERO. Class 3 is under.

The CHAIRMAN. Define class 3 and 4 for me.

Mr. GUERRERO. Class 4 would be 12 or under. Class 3 would be 12 to 99.

The CHAIRMAN. That's the same thing. I said under 100.

Mr. GUERRERO. When we talk about smaller firms in our testimony, we lumped them both together, any firms with less than 100 tanks.

The CHAIRMAN. Now, give me a range of insurance costs for those who can buy insurance in class 3.

Mr. GUERRERO. We have some preliminary information on the average annual premiums per tank. For insurance companies we contacted, annual average premiums per tank ranges from $500 to $1,350 for the smaller firms.

The CHAIRMAN. Per tank?

Mr. GUERRERO. Per tank.

The CHAIRMAN. Per year.

Mr. GUERRERO. Per year, with a minimum annual premium per site ranging from $1,300 to $5,000 and a minimum deductible, which is interesting, that ranges from $5,000 to $25,000.

The deductible is of interest because in many cases, EPA has told us that they estimate the average expense to clean up a problem at such facilities would range from $500 to $2,500. So, in most of those cases, given the size of those deductibles, cleanup costs would come out of the owner/operator's pocket.

The CHAIRMAN. Do you think $1 million requirement is reasonable?

Mr. DYCKMAN. If I could answer that, Mr. Chairman. We issued a report to the Congress in 1988 and had several recommendations, one of which was for EPA to look at that requirement because we were not certain at that time whether it was reasonable. Apparently it was based on EPA's wanting to make sure that 99 percent of the leaks would be paid for, but we did not feel they had good information on that. We still have not seen good information from EPA that is the right amount.

The CHAIRMAN. Do you have any studies to show about, for example, how much an operator—using the industry average of profits per gallon, and so on, did you have any studies indicating just what the financial impact would be, for example, for an average operator? We will just say somebody in category 3 that had 50 tanks.

What is the average number of tanks per station? Do you know that?

Mr. GUERRERO. Maybe about three.

The CHAIRMAN. About three?

Mr. GUERRERO. The financial impact of upgrading and replacing the tanks? I think it is going to vary. EPA may have a better

handle on that. I think they have told us something on the order of maybe $50,000.

The CHAIRMAN. Mr. Brand.

Mr. BRAND. To completely replace a system with three tanks could cost you $60,000 to $80,000.

The CHAIRMAN. To replace three tanks?

Mr. BRAND. Right.

The CHAIRMAN. I was really not talking about that cost, though. That is the thing that I think puts so many people out of business.

But I was really asking about the insurance for the financial responsibility. My question was based on today's market and profit margins and considering, say, an operator that is going to have to pay $3,000 per tank, that is $9,000 a year for one station. And you would have to compute somehow or other how many gallons more he would have to sell at the same profit margin just to break even. Has EPA done any studies on that?

Mr. BRAND. We did in the regulatory impact analysis. I would have to get that data for you, sir. I do not have it in my head.

The CHAIRMAN. Well, as staff correctly points out, that is assuming they can buy the insurance at any price, and I think that is the real problem that we are confronted with here. The capital cost, as you correctly point out, is going to eliminate plenty. That is going to take a lot of people out of business, and then others, who might be able to afford that cost, if they cannot buy the insurance at any price. I mean, this is really kind of crazy.

Mr. GUERRERO. One indication of the difficulty in perhaps purchasing insurance and affording it is just the sheer number of policies that have been underwritten. We contacted 10 insurers, including the major insurers, such as Federated and Petromark. Federated and Petromark account for something like 78 percent of the policies underwritten, but we're still talking about only 3,600 policies.

The CHAIRMAN. Nationwide?

Mr. GUERRERO. Nationwide, 3,600 policies out of a universe of 225,000 owners and operators. So, that is a very small number. It is about 2 percent, a little bit less than 2 percent, as of today. And, of course, that number will change presumably, but it reflects probably a good amount of difficulty they have experienced.

The CHAIRMAN. Let me ask you this. One of the things I have been thinking about ever since we got into this issue was whether or not it would be feasible to establish a fund maybe under the aegis of the States. For example, operate it very much like we do the banks where the banks pay a certain amount for insurance on their deposits. I do not know whether you could confine it just to class 3 and class 4 operators or not, but it seems to me that a system like that could be orchestrated and put together at a considerably lower cost than these figures you are talking about.

And if that is feasible—and I think really, Senator Boschwitz, we ought to have a subsequent hearing or at least some discussions about the feasibility of this where I don't know how many in my State, but if all the operators in class 3 and 4 were assessed, we'll say, a quarter of a cent a gallon or something like that to go into this fund, and we could get EPA to accept that based on the number of tanks involved and what the fund would have in it, for

example, at the end of 2 or 3 years to make it actuarially sound, there would not be anything wrong with that, would there?

Mr. BRAND. The law provides for them to form risk retention groups, and you are talking about a nationwide risk retention group in a sense.

The CHAIRMAN. I am really sort of thinking about the States, allowing the States to orchestrate this at the State level and get their plan approved by EPA.

Mr. BRAND. I see.

The CHAIRMAN. Rather than a nationwide undertaking.

That is what we do with reclamation of mines. As a matter of fact, you have a whole host of plans, like Mississippi's plan right now. You have already got the responsibility of approving State plans on these tanks. And it seems to me that it would not be—and if EPA does not have that kind of actuarial expertise or that kind of financial expertise, you could shunt it over to somebody else to make that determination.

What I am trying to do is to make sure that these financial responsibilities are not so onerous that people feel compelled to go out of business.

I am for underground clean water, and I tell you I took a lot of heat in my State from a lot of operators when EPA came out with their regulations, just as every Member of this Committee did, particularly the small operators who knew that it was going to be tantamount almost to putting them out of business. But I felt like I was sort of boxed because nobody wants leaky tanks around. We do not want our underground water and ground polluted, and so there was not an awful lot we could do about it anyway.

But when it comes to the financial responsibility, there is something we can do about it. And it seems to me where we are right now is just so onerous on the smaller operators that we must come up with an alternative to the existing situation.

I am very pleased, incidentally, that you gave these operators another year to come into compliance, and in that period of time, Senator Boschwitz and I will be trying to work something out to alleviate the problem.

Senator Kasten.

Senator KASTEN. Mr. Chairman, thank you.

Let me just say that it is my understanding that 34 States have done something like what you are talking about, Mr. Chairman. I know Wisconsin is one of them. And they are working to fill this gap.

But in my opinion, I think a 1-year delay from EPA is not adequate. Five years ago we had 75 insurance companies that were in this business. I am told in January there were two. If I heard you properly, it has gone up now to 15 or something like that. How many companies in the country? There were 75 companies in the country that were offering this kind of insurance before, and as of January this year, it was down to two.

Mr. GUERRERO. Twelve.

Senator KASTEN. We are up to what?

Mr. GUERRERO. We're up to 12.

Mr. DYCKMAN. When you consider companies that offer viable plans, it is less than 15.

Mr. GUERRERO. But the important thing is that there are two of them, Federated and Petromark, that account for 78 percent of the policies.

Senator KASTEN. The other thing that is important is look at the range of costs of the insurance that you gave us a moment ago in a response. I mean, there is obviously a big problem when the difference between the rates is as wide as it is with what you said is available. This insurance market is crazy. And it is wrong.

And I think a 1-year delay is not enough. Everybody is still worried about how they are going to get insurance. They are still worried about what they are doing. I think we need to have a 5-year delay, and in the meantime, we need to legislate some kind of a program here to knock that $1 million limit down or to work out some other kind of system.

Mr. Brand, I am told that the $1 million figure was basically just—the name we use is "internal EPA deliberations" or something like that, a typical kind of bureaucratic talk. Where did we get the $1 million? Is that right? Internal EPA deliberations?

Mr. BRAND. Well, let me say that for people that retail gasoline, market it and distribute it, that requirement was placed by Congress. That is in the law, that it should be a $1 million insurance requirement. It gave us freedom to set a different and lower limit for nonmarketers or for municipalities, but for retailers it is in the law.

Senator KASTEN. Well, we are going to need to work with that as well.

The CHAIRMAN. Senator Kasten, if you would just yield on that point.

Don't you have some experience on what it costs to clean one of these up?

Mr. BRAND. We have numbers that vary widely—it depends on who you count. As Mr. Guerrero indicated earlier, a lot of places you are going to dig up some soil, you're going to truck it off, you may aerate it, and it will cost you a few thousand dollars. In other places, it is running $250,000. We do not really yet know. We are going to know as we get to all of these sites that we are finding through the leak detection requirements that went into effect last December.

I talked to the State of Illinois last night. They have 2,600 confirmed releases. They do not yet know what those things are going to cost. They know it is going up.

Senator BOSCHWITZ. That's 2,600 releases?

Mr. BRAND. Confirmed releases. Right. That is not unusual.

Senator KASTEN. Mr. Brand and Mr. Guerrero, if we can get back to the issue. I am told premiums to get $1 million worth of insurance run up to $50,000 a year. At least that is what is happening in Wisconsin.

Now, I am also told, because we have this State fund now, that the average claim in Wisconsin to the State fund is $45,000. So, what are we doing with a cost of $50,000 a year in insurance when the average claim into the Wisconsin fund is $45,000? What kind of sense does it make to require someone to pay $50,000 a year in premiums to insure against claims which average $45,000 each.

Mr. BRAND. If I might comment on that. I would have to know a lot more about the $50,000 premium. How many stations does it cover? How old were the tanks? If you insure a 25 year old plain steel tank, you are almost betting that you are going to have an incident, once you look into it, that you are going to have to cover. And so, how high should the premium be if you know you are almost certain to have to pay out $10,000, $20,000, $30,000 or more? I don't have an answer to that. Fifty thousand dollars just sounds strange to me for one facility unless there is a lot wrong with it.

Senator KASTEN. This would be multiple tanks.

Now, let me go back. In Wisconsin, the same company, the average income for some of these smaller people, average income, people with two underground storage tanks—and I don't know if this goes across the country or not, but we are talking about an average income for at least half of these people—their income, total, is less than $50,000. So, that means the $50,000 premium puts them out of business. That's it. Simply because of a rule we had, they are now out, or they are in business in order to pay insurance and to pay taxes and they will not make any money. And obviously, they are not going to stay there.

The magnitude or the balance of this, the reasonableness of this is just absolutely wrong in my opinion. So, we have a little bit of a delay, but that does not solve the problem. There is a fundamental problem here when you see the difference in insurance rates that Mr. Guerrero talked about, when you see 75 people in the business a few years ago, and now we are up to 12, but then you have to quickly say but, well, wait a minute. Not all those people are in the business as much as the big two. This is a major problem. And I think that we have to recognize it is a problem. The delay needs to be more than a year, and then, Mr. Chairman, we have to legislate a change here, whether it is this committee or another appropriate committee.

Thank you, Mr. Chairman.

Mr. GUERRERO. Mr. Chairman, could I add with respect to that? We certainly have observed in our Statement and agreed that 1 year may not buy that much. We do have some preliminary data on the average site premium.

Let's talk in terms of a high risk facility. There is a considerable range. It is somewhere from $3,000 to $19,000, based on the information provided by three insurance companies, including two of the three largest providers.

Senator KASTEN. Did you say from $3,000 to $19,000?

Mr. GUERRERO. Yes, $3,000 to $19,000. So, if you are talking about $50,000, $50,000 could be an outlier of a special problem site.

But still, the important point is the deductible. The deductible for these policies is anywhere from $10,000 to $25,000. So, the point you make is entirely valid that you are paying a premium, but yet a deductible far in excess. It is not clear what you are buying for that premium.

And the numbers we have been told by EPA suggest that most of these cleanups are going to cost less than $10,000, and they are probably going to be in the range of $500 to $2,500. So, almost all of this is going to come out of the pockets of the owners and operators

of those facilities, and still they will be paying $3,000 to $19,000 for some coverage. It is not clear what that coverage is buying.

Senator KASTEN. The problem is this is just a very, very tough problem to insure against, and all the insurance people are sitting there saying, you know, one big one is enough to put our insurance company out of business. So, most of the insurance people have decided not to insure, and then the few that are there have these wide differences. And it is a little bit of a crap shoot. They just hope that they stay lucky and don't get the one big one, and meanwhile make a bunch of money on this insurance. Really, this is a situation that I think is intolerable, and a 1-year delay is not enough to solve the problem.

The CHAIRMAN. Mr. Guerrero and Mr. Brand, both, these 34 States that have approved plans——

Senator BOSCHWITZ. No, no. I do not think they are approved.

The CHAIRMAN. They have not been approved?

Mr. BRAND. Seven have been approved, and 17 are now being reviewed. And we expect the others to come in.

The CHAIRMAN. Mr. Guerrero, where does that 34 figure come from? "According to EPA, at this time 34 States have created trust funds."

Mr. GUERRERO. That is correct, but some have conditional approval and some have——

The CHAIRMAN. They have given final or conditional approval to about 23 it says here.

Mr. GUERRERO. That is right. The remaining are in the process. They are under review.

The CHAIRMAN. My question is this. Do all of those have substantial deductibles?

Mr. BRAND. They vary from as low as $10,000 to as high as $75,000.

Senator BOSCHWITZ. Deductible.

Mr. BRAND. Yes.

Senator KASTEN. Mr. Chairman.

The CHAIRMAN. Yes, Senator Kasten.

Senator KASTEN. What is happening here is that we created this problem. And the service station owners have contacted their State legislators because we have not responded. We created it. It is a Federal EPA problem. And we in the Congress have not responded. So, now what is going on is you've got State by State by State trying to somehow deal with it, but they are not all doing it the same way. And we are going to end up with different kinds of laws in different kinds of States with different kinds of costs for different kinds of coverage. And that is going to mean some people are going to be at competitive advantages and disadvantages depending on what kind of a State plan there is. And I think we need a Federal solution to this. I do not think that the States——

The CHAIRMAN. The premium cost for a pretty good size deductible is about as big as the premium for the whole thing, isn't it? Let's say you have a $25,000 deductible. That still leaves the company that you are buying from with a $975,000 exposure. By the same token, when they are setting premiums, they are making certain assumptions about what the average cost of a cleanup will be, and my guess is they are probably thinking in ranges of $25,000 to

$100,000 for cleanups. I don't know. I am not an expert in this field.

Mr. BRAND. Nor I. What I have learned from talking to the insurance industry and I have staff that are much more expert than I am on it.

Senator BOSCHWITZ. How can you not be an expert in the field? You are the Director of the Office of Underground Storage Tanks.

Mr. BRAND. Sir, I meant in relation to details of pricing of insurance.

Senator BOSCHWITZ. You are the Director of the Office of Underground Storage Tanks.

Mr. BRAND. Yes, sir.

Senator BOSCHWITZ. And you are not an expert in the insurance that deals with underground storage tanks.

Mr. BRAND. In the pricing.

Senator BOSCHWITZ. Who is supposed to be, Mr. Brand, if you are not?

Mr. BRAND. I have a staff that helps me. We have a lot of different areas we cover, sir.

The CHAIRMAN. We did not let Mr. Brand finish his statement.

Mr. BRAND. I'm sorry. I lost track of the question now, sir.

The CHAIRMAN. I have the same problem.

Senator Boschwitz.

Senator BOSCHWITZ. Let me ask. A normal gas station has how many tanks?

Mr. BRAND. Three.

Senator BOSCHWITZ. And this is $1 million per occurrence. In getting the insurance, therefore, is the $50,000 cost, the cost that we are talking about, per tank or per gas station?

Mr. BRAND. I'm sorry, sir. Was that the premium or the deductible?

Senator BOSCHWITZ. Premium and the deductible.

Mr. BRAND. Per station, per facility.

Senator BOSCHWITZ. Per station. One second. There's your staff, the experts.

Mr. BRAND. Excuse me, sir. I didn't hear.

Senator BOSCHWITZ. Is it per station or per tank?

Mr. BRAND. The $1 million coverage is for the owner and operator for their facilities. They have to have that to cover their facilities.

Senator BOSCHWITZ. And under this bill, you only have to get $1 million and it can include up to how many tanks again? I read that—the $1 million per occurrence. One to 100 tanks.

The CHAIRMAN. That is category 3. Category 3 is 12 to 100. Category 4 is one to 12. Is that correct?

Mr. GUERRERO. That's right.

Mr. BRAND. It covers all your tanks regardless of the number, per occurrence. You need $2 million aggregate if you get up above 100.

Senator BOSCHWITZ. A hundred? OK, up above 100.

I'm sorry I was not here for your testimony earlier.

In the case of Minnesota I might say, Mr. Chairman, I quickly calculated that there have been 184 sites that have been reim-

bursed by our State fund at a cost of $7.2 million. So, it is just a little shy of $40,000 a pop.

And we have a fund. I do not think ours has been approved.

If the State puts together a fund, it would seem to me it could be quickly approved by the EPA.

Mr. BRAND. Senator, we work with the States, where they ask us, before they prepare the fund, and sometimes after they pass the legislation, if they wait that long. It has to meet certain basic criteria, like there has to be a regular funding source and not depend on annual appropriations, for example. And it has to cover the groups that are required to be covered. Sometimes the wording in an individual State program is different and does not cover the right groups. So, we work with them in advance wherever they ask us to or if we can get in there.

Senator BOSCHWITZ. There are many exclusions in effect in this bill, are there not? I would imagine most underground tanks are not covered.

The CHAIRMAN. They are not covered now.

Senator BOSCHWITZ. They are not covered even after this bill.

Mr. BRAND. You are correct, sir.

Senator BOSCHWITZ. Tanks for storing heating oils which are used on site. If I had one by my home——

Mr. BRAND. Right.

Senator BOSCHWITZ [continuing]. It is not covered.

Mr. BRAND. Right.

Senator BOSCHWITZ. Farm or residential tanks with a capacity of 1,100 gallons or less storing motor fuel which is not for resale, not covered.

Mr. BRAND. Yes.

Senator BOSCHWITZ. I would imagine therefore that most tanks nationally are not covered, yet the bill exacts extreme hardship over those that are. Is that an accurate statement?

Mr. BRAND. Yes. That was a Congressional decision in the law.

Senator BOSCHWITZ. I understand that, but I would say to my Chairman here that most tanks are not covered, as I would see this. But yet, the ones that we have covered, we have imposed this great hardship on.

I like your approach of finding some means of putting together a fund, putting together a means of helping these people so they are not going out of business. This is such a difficult risk to insure that that must be a large part of the problem.

As you know, Mr. Chairman, I have been on the floor trying to head off a similar problem under the Clean Air Act. Who knows what kind of a mine field is out there under Clean Air? [Laughter.]

And so, we had a small business amendment which was just voted upon 98 to nothing. So, hopefully it will survive conference. [Laughter.]

We have put that together for the purpose of trying to help small business wend their way through.

Perhaps you could turn to Senator Levin and let him——

The CHAIRMAN. Senator Levin, do you have a brief opening statement?

Senator LEVIN. Just a brief opening statement which I would like to be made part of the record.

The CHAIRMAN. It will be printed in the record.

[The prepared statement of Senator Levin follows:]

STATEMENT OF SENATOR CARL LEVIN
SENATE SMALL BUSINESS COMMITTEE

March 21, 1990

Mr. Chairman, underground storage tanks can pose a serious public and environmental health problem in states like Michigan where the water table is high and the climate is variable. There may be as many 1000 leaking tanks out of 66,000 total in my state. Preventing leaks requires upgrading and vigilance. Unfortunately, many owners have been unaware, unable or unwilling to do what is necessary to protect the local groundwater or to clean it up once it gets contaminated.

To assure that owners of underground storage tanks do pay attention to environmental protection and do pay up when there is a leak or a need to prevent one, Congress required owners of underground tanks to meet certain requirements, including demonstrating the financial ability to clean-up and prevent contamination from their tanks. Because most insurers have not been willing to provide tank owners with the insurance necessary to meet this requirement, many states have stepped in and set up funds to act as insurance

for owners who meet state criteria. The State of Michigan has set up such a model program.

The extension that EPA has proposed appears to be for good reasons, but I will be interested to hear how the one year extension will change the picture very much for the smallest owners, in terms of obtaining insurance and encouraging their compliance. While I believe that EPA should seek to make environmental regulations as low cost as possible to the small business owner, EPA must be mindful of its mission to protect the environment.

Senator LEVIN. I just have a few questions when my turn comes up. Shall I ask a few questions now?

The CHAIRMAN. Oh, yes, by all means.

Senator LEVIN. These questions may have been asked. I think not precisely. So, let me press ahead and hope I am not duplicating any previous questions.

There was a March 14 update on underground storage tank financial responsibility in which the EPA said that while 34 States have enacted legislation creating State assurance funds, that only seven have received approvals to be used as compliance mechanisms.

Now, Michigan is waiting along with those other 27 States for certification so that the underground storage tank owners can cite the State fund as sufficient fulfillment of their financial responsibility requirements.

Can you tell us what the holdup is, if you haven't already this morning, on certification?

Mr. BRAND. I can't specifically on Michigan.

Senator LEVIN. No, in general. Why is it that there are so many States that are awaiting certification or approval?

Mr. BRAND. Well, the way the procedure operates is someone in the State decides to do something about it, usually in the State legislature. And through normal State legislative processes, they put together a bill. Depending on the State, they may or may not come to EPA very early and ask for help. That has happened in some States. We can help shape it at the front end so that it will meet the requirements. Others actually pass the bill and then send us a copy. We have to go back and rework. Those are the longer ones. We are working with the full range of those at this time.

Senator LEVIN. This certification is necessary, I presume, before the owners can be considered in compliance with the regulations?

Mr. BRAND. Right. May I add that when a State submits it to us, from the time that we get it, the tank owners and operators are considered in compliance until such time as we either bounce it back or it gets approved. So, while we are considering it, they are in compliance for the purposes of financial responsibility.

Senator LEVIN. They are in compliance while it is pending?

Mr. BRAND. Right, if it has been submitted to us.

Senator LEVIN. Yes, that's pending. Is that right?

Mr. BRAND. Yes.

Senator LEVIN. After it is submitted, it is pending.

Mr. BRAND. Yes.

Senator LEVIN. While it is pending, they are in compliance. It is de facto, presumptive compliance.

Can you just give us a list for the record of the length of time that the 27 States have been awaiting that certification?

Mr. BRAND. Yes, sir.[1]

Senator LEVIN. Thank you, Mr. Chairman.

The CHAIRMAN. Gentlemen, Ms. Narey, thank you all.

Senator BOSCHWITZ. May I ask a couple more questions?

The CHAIRMAN. Yes, of course.

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[1] Material not received at time of going to press.

Senator BOSCHWITZ. I see also that Senator Lott is here.

Why doesn't the EPA, Mr. Brand, let the States know what the requirements are so that the States can legislate effectively in the first instance?

Mr. BRAND. We have, sir. We have put out guidance. We have done training. We have held sessions with our regional offices so they could know all the requirements and go out and work with the States.

Senator BOSCHWITZ. Why don't you tell the States, not your own people? I understand that you train your own people, but it is not very difficult to send to the legislative leaders of the 50 States some information that in event they are going to pass legislation concerning underground tanks, they ought to contact EPA or Mr. or Mrs. so and so. Why don't you do that?

Mr. BRAND. Sir, we have done that. We have developed a handbook. That was sent out more than 6 months ago to all the States to help them and tell them where to call. We lean over backwards to help because we want to have State funds in place. We try not to be an obstacle in that.

Senator BOSCHWITZ. How much risk does the postponement of financial regulations pose to the environment or to third parties?

Mr. BRAND. I will have to think out loud with you on that one.

Senator BOSCHWITZ. Sure.

Mr. BRAND. If there is a release, the party has to report it or they are in violation. Most people have been reporting them. That is how we got these big numbers of reported releases.

The Agency will determine what work has to be done, and if it is an imminent danger to either public health or the environment and the owner-operator is not solvent, cannot pay, refuses to pay, he will draw either on a State fund or on the Federal trust fund to get that work going. They will not sit there and let environmental damage occur, or potential environmental damage occur.

Mr. GUERRERO. Senator, if I may add our perspective on that.

Senator BOSCHWITZ. Yes.

Mr. GUERRERO. We do not believe the postponement adds significantly to environmental risk at this stage. And the reason for that is because of the earlier discussion we had about the deductibles and premiums, and so forth. The numbers we have seen suggest that most of these problems could be dealt with for amounts far less than a typical policy deductible and would have come out of the owner-operator's pocket anyway. So, postponing the insurance requirements does not add any undue risk.

Senator BOSCHWITZ. So, you do not believe that there is much environmental risk by virtue of these postponements.

Mr. GUERRERO. That is not to say there is not some risk, but we do not believe it is significant.

On the other hand, I would like to balance it by saying that the postponement does take pressure off insurers to develop policies and markets and may take some pressure off the States to develop State trust fund alternatives. So, there is a balancing act that is necessary here, but by and large we do not see significant environmental problems.

Senator BOSCHWITZ. What are the prospects that small business owners will be able to comply with the extended deadlines? What

are they going to do in the next year? These companies are falling out of their desire to insure this risk or the insurance itself is so confiscatory as to not be insurance at all. I would ask that not only of Mr. Guerrero, but Ms. Narey?

Mr. GUERRERO. I think the prospects, of course, depend upon the speed at which EPA gives approval to the State trust funds that are pending as alternatives for facilities to provide for financial assurance.

It would also depend certainly on the developments in the insurance market over the next year, and the insurers could better speak to that. The fact that two major insurers to date have announced certain curtailments of their operations certainly does not bode well.

And finally, a third factor I'd suggest that is important for consideration is that as we know, these facilities are going to need resources to upgrade and replace their tanks. Even if they are able to get that financing, whether they get it through mechanisms such as Senator Baucus' bill, which would create a Federal Loan Guarantee Program, or whether they get it through a private lender, they will still have to obtain that financing. They will have to undertake the improvements. That for a universe the size you are talking about, which is hundreds of thousands, certainly it is not going to happen for all of them in a period of 1 year. Even when it is done, they may still find that insurance premiums are unaffordable.

Ms. NAREY. I think we would share the comments that have been made by the GAO both in terms of concern about financing for small businesses to do the upgrades or replacements or whatever they need to do to clean up any leakage, as well as also whether there is going to be any opening of the insurance market or swift approval of trust funds.

One positive development I suppose might be to the extent that these service stations or the tank owners are able to replace or upgrade their tanks, insurance may be more readily available, although the trends in insurance availability have not been positive. And I do not think we have seen any indications that they are going to become more positive.

Senator BOSCHWITZ. I guess that it is in the bill that the $1 million of coverage with respect to a petroleum marketer and $500,000 if it is not a petroleum marketer is just a legislative standard that we established?

Mr. BRAND. The $1 million was. We were allowed to set the amount for the nonmarketers. We were given that authority.

Senator BOSCHWITZ. Why is it less for a nonmarketer? Have we set the limit too high for a marketer in your judgment? Perhaps that is part of the solution.

Mr. BRAND. We found that the nonmarketers, people that own a furniture business, a volunteer fire station, a taxi fleet, people who are not in the business of selling gasoline, petroleum marketers had lower volumes, pumped lower volumes, usually than——

Senator BOSCHWITZ. They what?

Mr. BRAND. Pumped lower volumes of gasoline, just handled less throughput, had less tanks per facility, and so on. That was one reason why.

Senator BOSCHWITZ. And therefore they would be less likely to discover that there has been a loss.

Mr. BRAND. There was a lot of balancing in arriving at a decision. I cannot give you all the details of it at this moment.

Senator BOSCHWITZ. You are not an expert in that either.

Mr. BRAND. Sir, I can dissemble or I can tell you the truth.

Senator BOSCHWITZ. Who should we turn to who is an expert, Mr. Brand?

Mr. BRAND. I am going to ask to turn to Mr. Sammy Ng who is the chief of the branch that works on that.

Senator BOSCHWITZ. Have we made a mistake in your judgment? You might answer. Should we do it at $500,000? Is that adequate?

Mr. BRAND. Based on the evidence that we have so far of what the costs have been, it might well be.

Mr. NG. Senator Boschwitz, the level of the requirement, the level of insurance required, is in some ways a moot point. The question is whether the tank is insurable or not. And that goes for whether the tank is required to have $10,000 worth of insurance or $100,000 worth of insurance or $1 million worth of insurance.

From the insurance industry, we have heard that—you asked a question earlier about the basis for how insurers look at premium size and what have you. And in 1986, 1987 and probably right now, the base level that they will use to base the premiums on is an actual cost of $100,000 per claim. So, in a sense, when they sell you an insurance policy of $1 million, they expect to pay out $100,000 per claim not $1 million.

So, in a sense if you would sort of lower the requirement to a $½ million, it does not give that much relief to an insured. It would give some relief, maybe a 10 percent relief, but not much.

But again, when you talk about small business owners and the kind of tanks they own, the question is, is that tank insurable or not.

Senator BOSCHWITZ. Well, what is your opinion about the prospects of small business owners being able to comply with extended deadlines?

Mr. NG. The reasons why we chose the extension—and again, it sort of followed EPA's reasoning in 1988 when we promulgated the rule. That gave a 2-year compliance schedule. The laws do not say that EPA had a right or authority to phase in the compliance schedule. We looked at the situation in 1986, 1987 when we got the amendment from Congress and sort of said, look, this population of tank owners has different needs in terms of who can get insurance at what time.

So, EPA estimated how much time would be needed for different people to get insurance. We thought that for the smallest tank owners, those with less than four tanks, small communities, it would require the greatest time, time not only for insurance to be developed for that group, but also for state funds which we thought would be the main means for that group of owners to comply with the regulations. Now, whether an extension of 1 year will give them that time for all the States to create the State funds is again our own best judgment.

Senator BOSCHWITZ. Do any of you gentlemen have a sense of what the percentage of these underground tanks we have covered

by our legislation is, what percentage of underground tanks in the country?

Then I would turn to Senator Lott who has been very patient or back to the Chairman.

Mr. BRAND. Sir, if I might, on the exempt tanks, you are running about 5 million to 6 million in that category, the ones that we don't cover.

Senator BOSCHWITZ. That you do not cover.

Mr. BRAND. Underground storage tanks.

Senator BOSCHWITZ. How many tanks do we cover?

Mr. BRAND. Two million approximately.

Senator BOSCHWITZ. So, we cover somewhere between a quarter and a third of existing tanks.

Mr. BRAND. Yes.

Senator BOSCHWITZ. And on them we are imposing a very harsh penalty. That is maybe the wrong word, but some very harsh requirements.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Lott.

STATEMENT OF HON. TRENT LOTT, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator LOTT. Thank you, Mr. Chairman. I know that there has already been a lot of testimony and a lot of questions, and you have some other witnesses. So, I will try to be brief. But I appreciate your having this hearing.

And we appreciate what you are trying to do at the Environmental Protection Agency with the laws that we have heaped upon you in trying to develop regulations to implement it but I also am very pleased that we are looking at delaying these deadlines.

I would like to cite just a couple of recent examples that I have experienced in my own State of Mississippi and just make sure you are aware of it and ask how we are going to deal with these things.

Just last week, a fellow named Mr. Herman Rogers a small businessman in Lucedale, MS, a very small town, one of the poorer counties in the poorest State in the Nation, was notified by SBA that his application for an $87,000 SBA loan had been approved. Now, he was going to have a rural grocery store-service station combination, as you will typically find in rural America.

So, he went down to get his loan, and he was informed that he would need to fill out some additional forms in order to comply with environmental regulations. During the process on filling out those forms, he found that tests were required of the soil surrounding the storage tanks there, and when he contacted the testing lab, he was informed that the test would cost $4,500, and this, keep in mind, was after he had been notified his loan had been approved. So, here is an additional $4,500.

And then he was informed that if the test showed the soil was contaminated, he would be required to lift the tanks and dispose of all contaminated soil. And to dispose of that soil, he was advised it could cost well over $30,000.

The net result: if he has to go through this exercise, $4,500 and $30,000, it is not going to be economically feasible for him to go for-

ward with this loan and you will have a store and a station sitting there probably unutilized with the tanks and the soil contaminated just sitting there.

Now, probably this story could be told hundreds of thousands of times. What are we going to do about the small businessman like Mr. Roberts there in Lucedale, MS?

Mr. BRAND. When the law was passed and we started the program, let me give you a picture of the atmosphere. The atmosphere was the polluter pays. The kinds of questions you are raising now were not raised. If they were, I am not aware of that in any real way. It was to get the environment cleaned up. We have to do it as fast as possible.

Senator LOTT. I understand.

Mr. BRAND. In fact, we got hassled a lot about phasing the different rules in. Why are you taking 10 years to upgrade? Why are you taking 5 years, and so on? So, we tried to allow as much as we could within the law for that kind of phasing in.

The realities are now hitting us all, and they come down to who is going to pay.

Senator LOTT. All right. Let me build on that then.

In Meridian, MS, there was an area with several tanks underground, and the fellow that had owned it had gone bankrupt. The land was just sitting there and the tanks, if they were causing contamination, were continuing to do so, making it worse.

A local businessman, in fact, an oil jobber, was interested in the site. He wanted to buy it, but he was told by EPA in the regional office in Atlanta, if you do, you have to assume responsibility for the total cleanup up, to which he said, you know, I will work with something reasonable, but I did not cause the contamination. I am not going to pay for cleaning it all up. And EPA Atlanta said, sorry, the law or regulations are very specific. If you buy this, you are going to assume responsibility for the total cleanup.

The net result: He did not buy it. It is still sitting there. The soil is contaminated. Nobody is going to probably buy it. How are we better off?

Ms. NAREY. Senator Lott, if I might just point something out in respect to that same sort of situation.

SBA and other lenders are finding ourselves confronted by the exact issue that you are presenting in cases where we have made loans or guaranteed loans and the borrower has gone into default, and we are then faced with the prospects of do we buy in that collateral at a foreclosure sale or do we not because of the potential liability that we face by virtually being designated as an owner by EPA and under these various statutes. And it is a real concern to us as well as it is in the situation that you have presented.

Senator LOTT. I just think that we should definitely look into situations like this and get the necessary delays that we need in order to find ways to implement this thing fairly and reasonably and without causing the contamination to continue to exist. So, I certainly will support that effort by this Committee and by others.

Senator BOSCHWITZ. Mr. Chairman, I would say that in fairness it may not be their fault. I have been working away on Mr. Brand there, but it is not his fault. We are going to have to do some things, though, legislatively because I have run into that same

problem. I have personally run into that same problem of not being able to get loans because of the uncertainty.

What can we do to remove the uncertainties?

Senator LOTT. Do we need to change the law specifically?

The CHAIRMAN. We have to change the $1 million figure. I must confess I did not realize that figure was in the law. It is, isn't it, Mr. Brand?

Mr. BRAND. Yes.

Senator LEVIN. On that $1 million figure, will the gentleman next to Mr. Brand introduce himself?

Mr. NG. My name is Sammy Ng.

Senator LEVIN. Where you can get insurance, is there a significant difference in the premium for $1 million from ½ million?

Mr. NG. We have heard about a 10 percent reduction in premiums at the most.

Senator BOSCHWITZ. Were you here, Senator, when they talked about the premiums in answer to Senator Kasten's questions?

Senator LEVIN. No.

Senator BOSCHWITZ. Would you repeat that?

Senator LEVIN. I could look that up on the record, if you want, so we don't take more time.

Senator BOSCHWITZ. OK.

The CHAIRMAN. Gentlemen and Ms. Narey, thank you very much for being with us. We could probably spend another hour with you, but we need to move along. We have another panel coming up. Thank you.

All Members of the Committee have the right to submit additional questions in writing to the panel.

Our second panel is Mr. Duane Hitz, senior vice president, E.W. Blanch, Minneapolis; Mike Coulson, president of Coulson Oil, North Little Rock, AR; Phil Troutwine, president, C&B Warehouse Distributing, Inc., Virginia, MN. Please be seated, gentlemen.

Mike, I am going to start with you because I have another hearing I have to Chair and I am already late for it, but I want to hear your testimony. There are some prerogatives to being Chairman of the Committee.

Mr. COULSON. I appreciate your having me up here. Shall I go ahead?

The CHAIRMAN. Please do.

STATEMENT OF MIKE COULSON, PRESIDENT, COULSON OIL CO., LITTLE ROCK, AR, ACCOMPANIED BY ANN HINES, EXECUTIVE DIRECTOR, ARKANSAS OIL MARKETERS ASSOCIATION

Mr. COULSON. Good morning. My name is Mike Coulson. I am president of Coulson Oil Co. We are a motor fuels marketing company in Little Rock, AR. My dad started our business in 1969 with four gas stations that did 80,000 gallons a month. Last month we did 5 million gallons through 85 convenience stores and stations.

Because we have grown to a certain size, we have fallen into the cracks of EPA's financial responsibility provisions of the UST Program. Allow me to give you my company's history of attempted compliance with these regulations.

I have been insured since February 1985 by Federated Mutual. In 1986, Federated began to offer environmental impairment liability insurance to my company at an affordable $18,000 per year. In 1987, it increased to $30,000. In 1988, the quote was $135,000 with a $25,000 deductible for $500,000 coverage per occurrence. That figures $160,000 per year for $500,000 coverage. That was not a good insurance buy and I did not renew the policy.

As the EPA regulations took effect and October 26, 1989 loomed as a deadline for category 2 compliance, I examined my options to comply with the financial responsibility provisions. Because I am not a major oil company, I could not meet EPA's self-insurance or guarantee net worth test.

Traditional insurance has proven too expensive or unavailable. I called my Federal Mutual agent in the fall of 1989 as the deadline for proving my responsibility came closer and closer. He gave me a quote in excess of $200,000 if my tanks then met their underwriting requirements.

A State trust fund seemed to be the only option for small business, and I and other marketers in Arkansas lobbied for the enactment of the Arkansas Petroleum Storage Tank Trust Fund. Our counterparts in 34 other States have taken the same route.

The Arkansas fund legislation provides a means to build a fund to provide tank owners financial responsibility under EPA guidelines and to ensure a clean environment for Arkansas. The two-tenths of a cent environmental assurance fee is remitted by the wholesaler. It is not a tax at the retailer or end-user level. Tank owners are liable for the first $25,000 in Arkansas, and the trust fund covers the balance of the $975,000 if they are in substantial compliance with the relevant State and Federal regulatory programs. It also covers third party liability in the same amounts. Needless to say, the fund is expected to encourage owners and operators to make the necessary equipment upgrades, modifications, and leak detection installments in a timely manner.

The State of Arkansas has yet to submit our State regulations to EPA for approval. The Department of Pollution Control and Ecology is expected to do so within the next 30 days, and based on EPA Region VI's initial review, their approval is expected.

Meanwhile, category 2 tank owners like myself, who are looking to State trust funds, are in jeopardy of noncompliance with EPA's deadline of financial responsibility of last October 26, because EPA has only approved seven State trust funds. More time is needed for the State trust funds to get in place, approved and operating.

Nevertheless, EPA has finally recognized this due to some pressure by Senator Burns, which we appreciate, and announced on last March 15 the delay for 1 year of the effective dates of financial responsibility requirements for categories 3 and 4. However, my company is in category 2 and we received no delay. I continue to be concerned about the financial responsibility requirements for me and other category 2 owners. EPA must grant a delay here as well.

Since EPA has delayed some deadlines, the immediate concern of financial responsibility compliance on the smallest of tank owners has eased. Yet, further issues remain for all small business tank owners, and these must be addressed.

The lender liability issue. Tremendous sums will be spent by tank owners over the next 10 years to comply with EPA's technical requirements. Liability that bankers fear they are exposed to in taking a security interest upon a marketer's property must be eliminated. Like any small business we need access to capital and credit to survive and to retrofit and replace tank systems for EPA's technical regulations.

Unfortunately, the financial institutions are beginning to limit this access or are making it more expensive to obtain because of their concerns about liability. This unwillingness is based upon the lender's concern about the potential liabilities they face as secured creditors in underground storage tank sites. We believe this concern is due in part to their fears about Superfund liability which reflect an unawareness of the substantial and important differences between the LUST Trust Fund and Superfund. Unfortunately, the small petroleum marketer's failure to obtain capital will place them at a severe disadvantage in a highly competitive industry in relation to the major oil companies who do not have our problems in obtaining capital.

My recommendations are to delay the effective date of the financial responsibility provisions for category 2 owners as well until October 26, 1990. This will allow the State trust funds more time to be approved by EPA.

And as Senator Baucus has advocated, we feel should amend section 205 of SARA to allow LUST Trust Fund monies to be used to assist the States on a matching fund basis in financing the UST programs, also to create a low interest environmental loan program for small business, and to revise the appropriate sections of SARA to provide financial institutions guidance on the limits of their liability.

I appreciate your listening to my views and will be happy to answer any questions.

[The prepared statement of Mr. Coulson follows:]

Statement
of
Mike Coulson
President, Coulson Oil Company
Little Rock, Arkansas
before the
Senate Small Business Committee
Underground Storage Tanks
Washington, DC
March 21, 1990

Good Morning. My name is Mike Coulson. I am President of Coulson Oil Company, a motor fuels marketing company in Little Rock, Arkansas. My Dad started our business in 1969 with 4 gas stations that did 80,000 gallons a month. Last month we did 5 million gallons through 85 convenience stores and stations. We own 195 underground storage tanks. We are still a small business in relation to the major oil companies with whom I must compete. Because we've grown to a certain size, we fall into the cracks of EPA's financial responsibility provisions of the UST program. Allow me to give you my company's history of attempted compliance with these regulations. I have been insured since February 1985 by Federated Mutual. In 1986 Federated began to offer environmental impairment liability insurance to my company at an affordable $18,000. In 1987 it increased to $30,000. In 1988 the quote was for $135,000 with a $25,000 deductible and $500,000 coverage per occurrence. That figures $160,000 for $500,000 coverage. That was not a good insurance buy and I did not renew.

I decided to go without coverage. I had purchased environmental impairment insurance for two years when not required to do so by EPA. I instead set aside $10,000 per month for future liabilities in this area.

As the EPA regulations took effect and October 26, 1989 loomed as a deadline for Category II (100-999 tanks) compliance, I examined my options of compliance with the financial responsibility provisions. Those options were:

(1) Self-insurance

(2) Guarantee Contract

(3) Insurance

(4) Surety Bond

(5) Letter of Credit

(6) State Trust Fund

Because I'm not a major oil company, I could not meet EPA's self-insurance or guarantee "net worth" tests. Traditional insurance had proven too expensive or unavailable. I called our Federated representative again in 1989 as the deadline for proving financial responsibility came closer and closer. He gave me a verbal quote in excess of $200,000 - if my tanks met their underwriting requirements. I had a choice. Either spend that money for insurance or on upgrades. I chose not to buy the insurance. My bank would have granted me a $500,000 letter of credit. Since this would have substantially reduced my short term borrowing capacity, I ruled that out. The state trust fund seemed to be the best option and I and other marketers in Arkansas lobbied for the enactment of the Arkansas Petroleum Storage Tank Trust Fund. Our counterparts in 34 other states took the same route.

The Arkansas Fund

The Arkansas Petroleum Storage Tank Trust Fund legislation provides through a 2/10th's cent per gallon environmental assurance fee on motor fuels a means to build a fund to provide tanks owners financial responsibility under EPA guidelines and to ensure a clean environment for Arkansas. This 2/10th's of a cent environmental assurance fee is remitted by the wholesaler and is not a tax at the retail or end user level. Tank owners are liable for the first $25,000 in Arkansas and the trust fund covers the last $975,000 if they are in substantial compliance with the relevant state and federal regulatory programs. It also covers third party liability in the same amounts. Needless to say, the fund is expected to encourage owners and operators to make the necessary equipment upgrades/modifications and leak detection installation in a timely manner.

The State of Arkansas has yet to present the state regulations to EPA for approval. The Arkansas Department of Pollution Control & Ecology is expected to do so within thirty days and based on EPA Region VI's review, their approval is expected.

Meanwhile, Category II tank owners like me (100-999 tanks) who are looking to state trust funds are in jeopardy of non-compliance with EPA's deadline of financial responsibility compliance of last October 26th because EPA has only approved 7 state trust funds. More time is needed for the state trust funds to get in place, approved and operating.

EPA's March 15 Action Should be Expanded to Include Delay of Category II Deadlines

EPA has finally partially recognized this. EPA announced on March 15 the delay for one year of the effective dates of the financial responsibility requirements for Categories III (petroleum firms owning 13-99 tanks) and IV (petroleum firms owning 12 or fewer tanks, and all non-petroleum firms with a tangible net worth of less than $20 million, including local governments). Category III owners received a delay until April 26, 1991 and Category IV owners received a delay until October 26, 1991.

My company is in Category II and we received no delay. I continue to be concerned about the financial responsibility requirements for me and other Category II owners. EPA must grant a delay here as well.

Since EPA has delayed some deadlines, the immediate concern of financial responsibility compliance on the smallest of tank owners has eased. Yet further issues remain for all tank owners whether big or small and these must be addressed.

Lender Liability Issue

Tremendous sums will be spent by tank owners over the next ten years to comply with the EPA's technical requirements. Liability that bankers fear they are exposed to in taking a security interest upon a marketer's property must be eliminated. Like any small business we need access to capital and credit to survive. Unfortunately, the financial institutions are beginning to limit this access or making more expensive to obtain because of their concerns about liability. Let me explain. A typical small petroleum marketer that wishes to obtain a loan must offer his retail outlets as collateral.

These are his major assets. Since these properties by necessity utilize underground tanks, the bank will often refuse to provide financing if these properties are the only collateral available. In the alternative, the bank will require expensive testing, which the petroleum marketer pays for, to clear the loan. This unwillingness is based upon the lenders' concern about the potential liabilities they face as secured creditors in underground petroleum storage tank sites. We believe this concern is due in part to generalized fears about Superfund liability which reflect an unawareness of the substantial and important differences between the LUST Trust Fund and Superfund. Unfortunately, the small petroleum marketer's failure to obtain capital will place them at a severe disadvantage in a highly competitive industry in relation to the major oil companies who do not have problems obtaining capital.

Recommendations

1. Amend Section 205 of SARA to allow LUST Trust Fund moneys to be used to assist the states, on a matching funds basis, in financing their UST trust funds and programs. This recommendation has several advantages. First, it will provide a strong federal incentive to those states that have not yet created their own fund. Second, it will insure the financial stability of those state funds which have already been created but which may be under-capitalized. If additional revenue is needed for this purpose, one approach that bears close examination is revision of Section 251(d)(2)(B) of SARA to allow the collection of the LUST tax beyond the current $500,000,000 funding level. Taxes attributable to the LUST Trust Fund financing rate are likely to reach that level by this June, at which time the tax "triggers off". Another approach to obtaining additional revenue, if needed, would be to increase the LUST Trust Fund financing rate.

Increasing the tax from the current 0.1 cent per gallon to a full penny would raise approximately $900 million per year.

2. Create a low interest, environmental loan program for small businesses. This loan program would allow small businesses to avail themselves of capital to make the necessary changes in their businesses that are required by federal environmental statutes. The LUST Trust Fund could provide the revenue to finance this program, which could be managed by the States under their UST programs.

3. Revise the appropriate sections of SARA, subtitle I of the Resource Conservation and Recovery Act and the relevant regulatory provisions found in 40 CFR 280 to provide financial institutions guidance on the limits of their liability.

I appreciate your listening to my views, and I would be happy to respond to any questions.

Thank You

The CHAIRMAN. Mike, I am going to take the privilege of asking you a couple of questions because I have to leave.

First, I want to compliment you on that statement. An excellent statement.

Mr. COULSON. Thank you.

The CHAIRMAN. It is very clear.

For example, the Arkansas plan has a $25,000 deductible.

Mr. COULSON. Yes, sir.

The CHAIRMAN. About what would that coverage cost you? Do you know?

Mr. COULSON. Federated Mutual, my insurance company—what they are doing—they are one of the big insurers. They are looking—as each fund gets in place and set up, they are pulling out because they do not want first dollar coverage anyway. Federated currently writes a $25,000 deductible. So, I am going to self-insure the first $25,000.

The CHAIRMAN. How do you do that? How do you convince EPA that you are self-insured for that $25,000?

Mr. COULSON. Our understanding is in the approval process of our State trust fund, the DPC&E in Arkansas—it will allow a mechanism to allow people to meet that net worth test on the deductible. We don't know yet, but we feel the staff is going to require maybe one, two, three times net worth to meet the $25,000.

The CHAIRMAN. Are you paying two-tenths of a cent or one-tenth of a cent?

Mr. COULSON. Two-tenths of a cent per gallon on all motor fuels, diesel and gasoline sold or imported in the State of Arkansas. It is building up about $200,000 a month. We now have $2 million in it. We have had since last July, and the funding limit will be $15 million, which will take us another several years.

The CHAIRMAN. Well, do you have a cap on the plan at which point you do not have to contribute? For example, let's assume we do not have a claim for 5 years, and you've got $10 million to $15 million in the pot. There ought to be some point when you could cut your contribution maybe entirely or cut the amount.

Mr. COULSON. Once the fund reaches $15 million, we will cease paying the two-tenths of a cent. Should it fall below that——

The CHAIRMAN. Then you start paying.

Mr. COULSON. There may be a lower limit. Ann?

Ms. HINES. Twelve.

The CHAIRMAN. What is it, Ann?

Ms. HINES. Twelve million.

Mr. COULSON. Through payouts, if it falls below $12 million, then the two-tenths would kick back in. And many States have put limits like that and triggers on and off in these funding mechanisms.

The CHAIRMAN. Thank you very much, Mike.

I am going to have to leave, Senator Boschwitz. If you will take over the chairing.

Senator BOSCHWITZ. In that case, we will continue. Maybe I will just ask a question of Mr. Coulson.

How many problems have you had? You have how many tanks?

Mr. COULSON. I have 260.

The CHAIRMAN. That's 260?

Mr. COULSON. Yes, which puts me into category 2.

The CHAIRMAN. Mike, in your statement I thought you said 195.

Mr. COULSON. Well, we acquired two additional operations last year. I had not counted up the tanks.

The CHAIRMAN. It is 260.

Mr. COULSON. It is 260 now. We acquired some assets in Hot Springs and Fort Smith from Selby Haupert.

Senator BOSCHWITZ. The extension that was just granted does not apply to you.

Mr. COULSON. No, sir.

Senator BOSCHWITZ. No. See, he is in category 2.

Mr. COULSON. We are a large petroleum marketer as far as jobbers go in the State of Arkansas, but in the overall scheme of the petroleum marketing, we are still pretty small potatoes.

Senator BOSCHWITZ. I have been trying to convince the Senator from Arkansas that in the overall scheme of things, Arkansas [laughter]——

With no success I might say.

But I wanted to ask you. How many problems have you had with either the 195 tanks or——

Mr. COULSON. Well, we have had several problems. I guess we have had two incidents while I was insured. And I cost Federated some money, as did many people, and they had to pay my claims. We got some gasoline into some telephone company manholes and you can cause some problems to long distance and the switching equipment. I was insured with Federated at that time.

But since then, after I took care of those at Federated and I did not renew my insurance, we got real serious about looking after our own tanks. And since that time, we have not had any big claims.

The CHAIRMAN. Mike, how much money have you spent on new tanks and just upgrading to make sure you don't have any leaks?

Mr. COULSON. Since the first of November—I looked at our figures the other day—we are spending about $10,000 a month in tank testing, in retrofitting, and we have a long ways to go. And I can see that possibly doubling or tripling over the next 4 or 5 years just to stay in compliance with the technical regulations.

Senator BOSCHWITZ [presiding]. How many additional tanks did you buy and how did you buy them? How can you take the additional risk?

Mr. COULSON. Well, I guess we have got the risk. We are in the business of selling gasoline. I can't get out of it. I haven't figured out another way to sell the product without utilizing underground storage tanks. And we feel like we are willing to take the risk, I guess.

Senator BOSCHWITZ. You bought how many additional tanks? How many additional sites?

Mr. COULSON. I think the number is 18 additional sites over the past 6 months.

Senator BOSCHWITZ. And that is roughly 50 additional tanks.

Mr. COULSON. Yes.

Senator BOSCHWITZ. And you've assumed the risk with respect to them.

Mr. COULSON. Yes, and upgrading. The technical requirements of the upgrading over a 10-year period that started in December 1988 gives us all some time to meet the requirements. But it is very expensive.

Senator BOSCHWITZ. Just a matter of interest. In purchasing these, has the market value of these service stations gone down because of these requirements? Has the market value of your business gone down because of these new requirements?

Mr. COULSON. I don't know the appraisal community, but certainly when anyone attempts to—of course, a lot of gasoline real estate—sometimes it is pretty quality commercial real estate. And anybody who wants to buy that type of real estate that has had tanks or a history of tanks on the site—a lot of money has to be spent by either the purchaser or the seller to determine the extent of any prior problems.

So, it casts a cloud, certainly, over service station real estate because the bankers still have not been convinced that there is a difference between Superfund and underground storage tank liabilities.

Senator BOSCHWITZ. Does the Superfund impose different types of requirements? I don't know myself. Does the Superfund impose requirements upon you beyond this?

Mr. COULSON. To my knowledge, no, sir. Superfund covers hazardous waste. I know when Congress passed this legislation, our industry was trying to be very careful in distinguishing and not getting us thrown into the same category as the Superfund substances.

Senator BOSCHWITZ. Finally, you said that the October 26 deadline is not easy for you to cope with. But as I gather from the testimony of the last panel, Mr. Brand and his assistant, Sammy, that in the event that Arkansas applies, presents the State regulation or the State bill to the EPA, then you are automatically extended, I gather.

Mr. COULSON. Yes. In other words, the Pollution Commission has to act on it next week. If they send it off to the EPA, we think that we were shooting to get this thing approved by April 26 which was the former deadline for category 3. So, if that happens in the next 2 months, I come into compliance definitely.

Senator BOSCHWITZ. Senator Lott, Mr. Coulson is a friend and constituent of the Chairman of the Committee, and so at the culmination of Mr. Coulson's testimony and before we went to the other witnesses, we have been asking Mr. Coulson some questions.

Senator LOTT. In the interest of time, I will pass, but we appreciate your coming up here and telling your story. And we hope we can help you. I assume that you are going to get the approval you need.

I understand my own State of Mississippi went quickly into action on this.

Mr. COULSON. They were early in this process.

Senator LOTT. We were No. 2 in the approval, and it is certainly something that is going to help us with the problem.

Thank you for your testimony.

Senator BOSCHWITZ. We will turn to Mr. Hitz. Nice to have you here.

STATEMENT OF DUANE E. HITZ, SENIOR VICE PRESIDENT, E.W. BLANCH CO., MINNEAPOLIS, MN

Mr. HITZ. Thank you. My name is Duane Hitz. I am senior vice president for the firm called E.W. Blanch Co. in Minneapolis, which is a reinsurance brokerage firm.

My remarks are in two parts. First, a description of my unsuccessful efforts over the past 18 months to establish a Comprehensive Insurance Program for retail service station underground storage tanks in Minnesota. And second, I would like to relate to the Committee my own personal views as to possible alternative approaches to fund the significant costs of cleaning up damage to the environment from leaking underground storage tanks throughout the country.

I have been employed as a property and casualty reinsurance broker for the past 27 years. Among other things, in the normal course of business, we frequently work with primary insurance agents or brokers to assist them in finding insurance companies who will underwrite a particular product.

It was in this manner I first became involved with the problems related to insurance of Underground Storage T[illegible]. A broker client asked for my help in designing an underground storage tank program in Minnesota. We jointly prototyped an insurance policy which would provide coverage in excess of the Minnesota Petro Fund limit of $250,000 up to the $1 million minimum financial responsibility requirement of EPA.

I made contact with several reinsurance underwriters to obtain initial expression of interest in providing reinsurance support for such a new product. In addition, formal written presentations and personal visits were made with over a dozen prominent insurers who we knew would be willing to consider underwriting environmental liability coverages.

My discussions with reinsurance underwriters confirmed my belief that reinsurance support would likely be available, assuming a convincing case could be made the primary underwriter of the viability of the product. By contrast, we had no similar positive response from the primary insurance underwriters we contacted.

The general response we received from the companies can be summarized pretty much as follows.

First, most would have been willing to consider underwriting the coverage if it were cleanup cost coverage only in excess of the State fund limit of $250,000.

Second, none would consider underwriting third party liability coverage. The reasons were many and varied, but two principal reasons emerged.

First, future claims and litigation arising from third party claimants against service station owners was perceived would become routine and frequent as potential claimants and their attorneys became aware that liability insurance was in place to comply with EPA regulations.

And second, the unpredictability of the course of future litigation and court awards makes it impossible to promulgate a proper premium.

As a result, we today believe that the likelihood of finding an insurance carrier to underwrite this product is remote.

Senator BOSCHWITZ. What is the difference between primary reinsurance and what was the other one?

Mr. HITZ. A reinsurer. A primary insurance underwriter is an insurance company who issues an insurance policy to the original buyer of insurance. A reinsurance transaction is a transaction between that insurance company and another insurance company who is called the reinsurer.

Senator BOSCHWITZ. So, the primary insurers, if they could not get reinsured, would probably decide not to——

Mr. HITZ. That's correct.

I believe it is a correct assessment at this point that reinsurance coverage would be available if the primary insurance company who was underwriting the coverage could make a good case to the reinsurance underwriter. We had several discussions with underwriters both domestically as well at Lloyd's of London. And there is, in fact, a willingness to consider underwriting reinsurance of such a product.

I can summarize my own personal views, switching from the insurance availability, by making three points.

First, the minimum financial responsibility requirements of EPA impose on the owner of the underground storage tank the entire financial burden of the cost of cleanup of damage to the environment from a leaking tank. These costs are excessive for the majority of small business owners even if shared collectively with other tank owners through an insurance mechanism.

I therefore strongly urge creation of Federal guidelines for State administered petro funds similar to that of Minnesota which funds its operation through an excise tax on gasoline products. Uniformity of approach among state petro funds would be highly desirable. The funding of necessary cleanup costs should be shared by the public at large and not by one business segment.

Second, requiring third party liability minimum financial responsibility goes a step beyond the EPA mission of cleaning up damage from leaking tanks. I would strongly urge that this requirement be eliminated and that minimum financial responsibility requirements be limited to on-site cleanup costs.

Third, I do not believe that private insurers should be made the instrument of social policy. The insurance industry can and will respond to bona fide needs for risk-sharing mechanisms when the nature of the risk allows it to be insurable at an affordable price.

Damage to the environment from leaking underground storage tanks is the inevitable result of past tank construction technology. Even today's standards will not guarantee that a tank will not leak.

This is a collective problem of a society who demands availability of gasoline service stations to fuel their automobiles, and I would argue that the cost of cleanup of leaking underground storage tanks should be shared by the motoring public.

Thank you.

[The prepared statement of Mr. Hitz follows:]

March 15, 1990

INSURANCE AVAILABILITY

UNDERGROUND STORAGE TANKS

Remarks prepared for testimony

before the Senate Small Business Committee

March 21, 1990

Duane E. Hitz
Senior Vice President
E.W. Blanch Company
Minneapolis, Minnesota

My remarks are in two parts:

> First, a description of my unsuccessful efforts over the past eighteen months to establish a comprehensive insurance program for retail service station underground storage tanks located in Minnesota;
>
> Second, I wish to relate to the Committee my own personal views as to possible alternative approaches to fund the significant costs of cleaning up damage to the environment from leaking underground storage tanks throughout the country.

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It was in this manner I first became involved with the problems related to insurance of underground storage tanks. A broker client asked for my help in designing a UST program in Minnesota.

We jointly prototyped an insurance policy which would provide coverage in excess of the Minnesota state Petro Fund limit of $250,000 up to the $1,000,000 minimum financial responsibility limit required by EPA regulations.

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presentations and personal visits were made with over a dozen prominent insurers who were known to consider underwriting environmental liability coverages.

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First, most would have been willing to consider underwriting the coverage if it were cleanup cost coverage only in excess of the state fund limit of $250,000.

Second, none would consider underwriting third party liability coverage. The reasons were many and varied, but two principal reasons emerged:

1. Future claims and litigation arising from third party claimants against service station owners would become routine and frequent as potential claimants and their attorneys became aware that liability insurance was in place to comply with EPA regulations;

2. The unpredictability of the course of future litigation and court awards makes it impossible to promulgate a proper premium.

As a result, we today believe that the likelihood of finding an insurance carrier to underwrite this product is remote.

I can summarize my own personal views by making three points.

First, the minimum financial responsibility requirements of EPA impose on the owner of the UST the entire financial burden of the cost of clean up of damage to the environment from a leaking tank. These costs are excessive for the majority of small business owners, even if shared collectively with other tank owners through an insurance mechanism.

I therefore strongly urge creation of Federal guidelines for state administered Petro Funds similar to that of Minnesota which funds its operation through an excise tax on gasoline products. Uniformity of approach among state Petro Funds would be highly desirable. The funding of necessary cleanup costs should be shared by the public at large and not by one business segment.

Second, requiring third party liability minimum financial responsibility goes a step beyond the EPA mission of cleaning up damage from leaking tanks. I strongly urge that this requirement be eliminated and minimum financial responsibility requirements be limited to on site cleanup costs.

Third, I do not believe that private insurers should be made the instrument of social policy. The insurance industry can and will respond to bona fide needs for risk sharing mechanisms when the nature of the risk allows it to be insurable at an affordable price.

Damage to the environment from leaking underground storage tanks is the inevitable result of past tank construction technology; even today's standards will not guarantee that a tank will not leak.

This is a collective problem of a society who demands availability of gasoline service stations to fuel their automobiles. I would argue that costs of clean up of leaking underground storage tanks should be shared by the motoring public.

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Senator BOSCHWITZ. Thank you very much, Mr. Hitz.
Now, Mr. Troutwine.

STATEMENT OF PHIL TROUTWINE, PRESIDENT, C&B WAREHOUSE DISTRIBUTING, VIRGINIA, MN, REPRESENTING THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA

Mr. TROUTWINE. Thank you, Mr. Chairman.

My name is Phil Troutwine. I am president of C&B Warehouse Distributing, a petroleum marketing firm headquartered in Virginia, MN. I am a past president of Northwest Petroleum Association, the Minnesota and North Dakota trade association. I have also served on the board of directors of the Petroleum Marketers Association of America, a national federation of state associations. I am also chairman of Minnesota's Petroleum Tank Release Compensation Board and have been in that position since it was established in 1987.

Senator BOSCHWITZ. What is that?

Mr. TROUTWINE. Petrofund.

Senator BOSCHWITZ. That is the Petrofund.

Mr. TROUTWINE. Yes.

Senator BOSCHWITZ. Oh, I see, OK. I see it is in the next sentence. Go right ahead.

Mr. TROUTWINE. I am here today representing, among others, the Petroleum Marketers Association of America, and I would like to have their full written statement submitted for the record, if I may.

Senator BOSCHWITZ. Fine. I have that here.

Mr. TROUTWINE. I would like to talk about my personal experience as a small businessman and as an underground tank owner working to comply with EPA's regulations, in particular the underground petroleum storage tank technical standards and the financial responsibility requirements. In addition, I would like to comment on Minnesota's Petrofund, its impact on small businesses and how State funds can be aided by Federal action.

First I want you to know that my company and most companies like mine are working hard to continue complying with all the regulations. While the financial hardships caused by the technical standards may be difficult for us, we understand that what is required is what needs to be done. While we realize that the EPA's technical standards are tough, we also recognize that the EPA had the wisdom to allow us to phase into compliance options over a reasonable period of time.

We now own or operate 21 underground storage tanks at eight different locations. The ages of these tanks range from new to unknown. All of the tanks and related piping are in compliance with EPA's technical standards. We can continue in compliance until late December 1998, by doing no more than our normal daily manual inventory reconciliations and having the tanks and piping tested annually for tightness.

However, unless there is a drastic change in the pollution liability insurance market within the next 12 months, we will not be able to comply with EPA's financial responsibility requirements. As we have been talking about, we have until April 26 of next year

to certify that we meet certain requirements. In our case, we will have to have a $1 million pollution liability policy. In Minnesota, there is no policy available that would cover all of our tanks. We can purchase coverage for tanks less than 10 years old, or in our case 11 tanks. The policy would have a deductible of $250,000, which is the Petrofund ceiling. The policy would cost us between $15,000 and $25,000 per year. To my knowledge, such a policy is offered only by one company and only in Minnesota. I know of no coverage available for the rest of our tanks, those over 10 years old.

If all our tanks were new and all our locations had state-of-the-art leak detection devices, our premium for the same coverage would be between $5,000 and $10,000. So, you can see why, just from a financial standpoint, it is so important for us to move quickly to replace older underground systems.

Of course, this gets us back to where we always end up, and that has to do with money and the lack of it. Our cost to replace two underground storage tanks last December was $22,000 per tank. This included required protected tanks and piping, inventory control and leak detection systems, and site preparation, and the electrical work. We have 14 tanks to upgrade, or as a practical matter to replace. So, we would need over $300,000 to complete the upgrading. Today our company cannot borrow that much money for that kind of project. We would be replacing equipment that still has up to 10 years of useful life. We would be getting very little return on the investment.

I am not sure today how we are going to get out of this dilemma, but I will admit that I am in a better situation than I was last Thursday before the EPA postponed the financial responsibility deadline for most of the independent marketers.

In Minnesota we are very fortunate to have an active cleanup fund. Through February of this year Petrofund has reimbursed responsible parties over $6.5 million since 1987, 49 percent of which has gone to small businesses or individuals. As of now, it looks like as much another $8 million will be reimbursed by the end of this year. Our State government recognized early on that what had to be done was not just a matter of ordering businesses to do it. The small business sector of the State simply did not have the financial wherewithal to solve the problems that they would incur.

EPA regulations allow tank owners and operators to use State trust funds, such as Petrofund, as a means to demonstrate financial responsibility compliance, but only if the fund is approved by the EPA. Minnesota submitted its State fund for approval over 6 months ago, and to my knowledge, has not yet received approval or disapproval. Even a disapproval with reasons for denial would be of more benefit than no answer whatsoever. There are currently bills before our State legislature——

Senator BOSCHWITZ. I gather from the earlier testimony, you would have been covered and not subjected to the April 26 deadline.

Mr. TROUTWINE. We would have been subjected to it from $250,000 up to $1 million.

We have bills before our legislature today proposing amendments to the State fund to enable it to meet the EPA's financial requirement. If the proposed legislation needs to be changed to meet the

EPA satisfaction, then we can do it while the legislature is still in session. If we do not get an answer within the next week or so, we will not be able to correct a negative response this year. The State legislature will adjourn in mid-April and not meet again until 1991.

I think you can see that we are putting a great deal of time, money, and effort into compliance with EPA's underground tank regulations. However, we think there are several steps which can be taken to fine-tune the statutes so that small business closings can be reduced, and at the same time upgrading can be accelerated.

First of all, we would recommend to amend the Superfund Amendments and Reauthorization Act of 1986, or SARA, to allow the LUST fund to be used to assist States on a matching basis in financing their underground storage tank funds and programs. It would provide a strong incentive to those States that have not created their own funds. It would also provide financial stability to State funds already created and operating.

Second, we would recommend the creation of a Low Interest Environmental Loan Program for small businesses. Such a program would allow small businesses to avail themselves of capital to make the necessary changes in their businesses that are required by Federal statutes. The LUST Trust Fund would be one way of providing revenue to finance this program.

And third, I think the EPA should be required to promptly reply to State applications for approval of funds as applicable to financial responsibility requirements. Further require that a negative reply be accompanied with a list of changes to be made before approval would be granted.

I do not think we are asking for a handout for small businesses at the public's expense. We are simply asking for the existing statutes to be fine-tuned so that we have the chance to stay in business while operating in an environmentally safe manner.

Thank you for this opportunity to give my views.

[The prepared statement of the Petroleum Marketers Association follows:]

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PMAA PETROLEUM MARKETERS ASSOCIATION OF AMERICA

Statement of

THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA

Before the

COMMITTEE ON SMALL BUSINESS

UNITED STATES SENATE

On

UNDERGROUND STORAGE TANK PROGRAM

March 21, 1990

Washington, DC

1120 VERMONT AVENUE, NW • SUITE 1130 • WASHINGTON, DC 20005 • (202) 331-1198

PMAA is a federation of 45 state and regional trade associations representing more than 10,000 independent petroleum marketers through the United States. These marketers sell approximately 50 percent of the gasoline, 75 percent of the home heating oil and 60 percent of the diesel fuel sold in this country. Eighty-nine percent of PMAA's membership is classified as small businesses under size categories established by the Small Business Administration.

PMAA commends Co-Chairmen Bumpers and Boschwitz for holding this hearing today and we appreciate being given the opportunity to testify. Our comments today will focus on three basic issues related to petroleum underground storage tanks. These are lender liability, financial responsibility and technical standards. As the Committee is aware, the Environmental Protection Agency last week announced a one-year delay of two of the three financial responsibility deadlines. That action by EPA was welcome news to PMAA and our members; we will offer detailed comments on that action.

Throughout the past two decades, the people of this nation have shown an increased awareness of and sensitivity to environmental concerns. This has resulted in the enactment of such legislation as the Clean Air Act, the Safe Drinking Water Act, the Comprehensive Environmental Response, Compensation and Liability Act (Superfund) and the Resource Conservation and Recovery Act, to name just a few of the protective measures that now have a far-reaching effect upon our nation's health and safety.

As citizens and parents, we all support the goals of environmental protection. No one here in this room today that would debate the contention that the preservation and protection of our land, air and water is necessary, not only for our own health, safety and welfare, but for that of our children and grandchildren. However, in an industrialized nation with a strong economy such as the United States, we also know that there will always be a tension between economic activity and environmental concerns, and that accommodations must be made to adjust this tension from time to time to arrive at a reasonable balance. Where the economic activity in question is the providing of a critical service to the public by small businesses, such as the delivery of petroleum products to rural areas, it is important that our environmental laws and regulations be carefully drafted to ensure that the economic burden is commensurate with the risk posed. An example of such a carefully drafted regulation is the final rule the U.S. Environmental Protection Agency (EPA) adopted last year which imposes technical standards for petroleum underground storage tanks (USTs). These standards are a balanced, reasonable and amply protective approach to the goals of prevention, detection and correction of petroleum releases. While these requirements will impose a significant hardship and cost on many petroleum marketers, the technical standards accommodate the needs of small business UST owners and operators by providing them with a reasonable amount of flexibility in their compliance options.

In other cases, the concepts underlying environmental legislation, while appearing rational and just in principle, sometimes impose disproportionate burdens, or have unforeseen and undesirable results when implemented. Section 205 of the Superfund Amendments and Reauthorization Act of 1986 (SARA) is a case in point. An increasing reluctance of financial institutions to lend badly needed funds to marketers to replace

and upgrade their underground storage tank systems, has hindered marketers' efforts at making their tanks environmentally sound. In addition, insurance company withdrawals from the pollution liability market and skyrocketing insurance rates, have hampered marketers' ability to obtain financial responsibility for their USTs.

As a result, some "fine-tuning" of the statutes applicable to underground storage tanks is advisable. The issue of lender liability is the first area in which such fine-tuning would be appropriate.

LENDER LIABILITY

Marketers all across the country are doing what they can to upgrade and replace their tanks to comply with EPA's technical standards. Yet, many small businessmen are having difficulty obtaining private financing, due to a hesitancy based upon the lenders' concern about the potential liabilities they face as secured creditors in underground petroleum storage tank sites. The delay in the financial responsibility requirements does give these business owners some breathing room, but, unless the financing misconception is clarified, the same problem could still exist when the new deadlines arrive.

For business owners to demonstrate financial responsibility, many must obtain pollution liability insurance. Essentially, insurance companies will not offer tank insurance until existing tanks have been either upgraded or replaced, soil tests have been taken, etc. At the same time, banks tell business owners that they will only finance installation of new or upgraded tanks if the tanks are insured against possible leaks. Marketers caught in this "Catch-22" situation desperately need some help from the Small Business Administration in encouraging banks to finance these technical improvements so they can ensure their tanks are environmentally sound. During an October 31 hearing before a House Small Business Subcommittee, the Environmental Defense Fund - when questioned - admitted they would rather see a businessman spend money to improve the quality of his tanks than pay costly insurance premiums.

PMAA continues to be concerned about reports (see Attachment 1) received from independent petroleum marketers in several states that their lending institutions are unwilling to make loans for underground petroleum storage tank purposes, including upgrades, replacements or remediation of releases. We believe this concern is due in part to generalized fears about Superfund liability which reflect an unawareness of the substantial and important differences between the LUST Trust Fund and Superfund. A recent environmental guide published by the American Bankers Association articulates these fears as follows:

> For many years, industrial and other commercial entities have stored heating oil, gasoline, solvents, and other chemicals in tanks located beneath the ground. In recent years it has become apparent that many of these tanks have leaked. Congress responded to public concern about this problem by requiring EPA to regulate underground storage tanks. The regulations impose construction, installation, leak monitoring, insurance and financial responsibility requirements for underground tanks.

> Additionally, Congress provided $500 million to EPA to pay for a government cleanup of past leaks from such tanks. EPA is empowered to recover the costs of these cleanups from the parties legally responsible for the leaks. The present owner or operator may be liable for this cleanup even if it was unaware that the tanks existed. Government agencies and courts are likely to construe this part of RCRA as broadly as Superfund and may extend liability to lenders, particularly if there is no other party available to pay the costs. (Managing Environmental Risk: A Practical Guide for Bankers, American Bankers Association (1989)). (Emphasis added.)

As you know, Congress was aware of lenders' Superfund-related fears when it established the LUST Trust Fund in 1986. Accordingly, it defined the term "owner" to exclude "any person who, *without* participating in the management of an underground storage tank and otherwise is not engaged in petroleum production, refining and marketing, holds indicia of ownership primarily to protect such owner's security in the tank." (42 U.S.C. 6991(b)) Thus, a bank or other lending institution that meets these simple conditions (i.e., is not engaged in the management of an underground storage tank, etc.) is not subject to cost recovery under the LUST Trust Fund. It would seem, therefore, that fears that the courts would extend liability to lenders for cleanup of underground petroleum storage tank releases under the LUST Trust Fund are not well founded.

Although the LUST Trust Fund contains language specifically designed to assure lenders that they will not be subject to "Superfund-type" liability associated with a security interest in an underground petroleum storage tank site, PMAA is concerned that certain ambiguities contained in 40 CFR Part 280 give rise to what appear to be legitimate questions about lender liability under the underground tank regulations themselves. For example, Section 280.12 defines the term "owner" more broadly than and without reference to the protective statutory language applicable to lending institutions:

> (a) In the case of an UST system in use on November 8, 1984, or brought into use after that date, ["owner" means] any person who owns an UST system used for storage, use, or dispensing of regulated substances; and
>
> (b) In the case of any UST system in use before November 8, 1984, but no longer in use on that date, ["owner" means] any person who owned such UST immediately before the discontinuation of its use.

Under 40 CFR Parts 280 and 281, "owners" of underground storage tanks share with "operators" compliance responsibilities associated with all aspects of the technical and financial responsibility requirements, including Subpart F, Corrective Action directives. Conceivably then, the regulations could be interpreted as requiring a lender, who has become an "owner" of an underground petroleum storage tank site based upon

the exercise of its security interest only, to report any release to the implementing agency under Section 280.61 and comply with other release response and corrective action requirements under that Subpart. As an "owner" under the regulations, the lender could also be subject to a cleanup order issued by the EPA or the implementing agency. In such a case, the lender would be forced to choose between refusing the order on the one hand, or complying on the other. If the lender complies, then it actually becomes involved in the management of the site, making it ineligible for the unique protected status accorded to lenders holding a mere security interest under the LUST Trust Fund. If it refuses, it preserves its protected status but risks, among other things, public criticism.

This result is surely not what Congress intended when it sought to protect those who hold indicia of ownership primarily to protect their security interest in a tank site.

In view of the above, PMAA has requested that EPA issue a statement of clarification concerning lender liability under the underground storage tank regulations. We have asked that this statement, like the LUST Trust Fund, make clear that EPA will not seek cost recovery from lenders which are not engaged in petroleum production, refining and marketing and who do not participate in the management of an underground storage tank. It should also elucidate such a lender's responsibilities under 40 CFR Part 280. Since one of the primary objectives of cost recovery under the LUST Trust Fund "is to provide incentives for owners and operators to comply with technical and financial responsibility requirements" (Cost Recovery Policy for the Leaking Underground Storage Tank Trust Fund, OSWER Directive 9610.10, October 7, 1988) we would submit that it makes little sense to subject such a lender protected under the LUST Trust Fund to the requirements of Part 280.

Without such a clarification, we believe that the problems marketers are experiencing with their lenders will certainly become worse. Those who cannot obtain financial assistance will not be able to upgrade their tanks, and those who cannot upgrade their tanks will find it very difficult, if not impossible, to obtain insurance. Leaving the issue for the courts to decide is no solution, since the prospect of litigation and uncertainty is precisely what lenders are seeking to avoid in refusing to make loans for underground storage tank purposes.

In response to PMAA's request, EPA says it has formed a "task force" (composed of one person) to study the issue and decide whether any action need to be taken. We fear that in establishing a task force rather than taking decisive action, EPA is not placing the necessary priority on this important issue. Because decisive action on this issue does not appear to be forthcoming at EPA, we would ask this Committee to consider looking into this critical issue.

As previously mentioned, the average annual expenditure for tank upgrades in 1990 is expected to be close to $80,000; yet, many banks are turning their backs on long-time customers out of Superfund liability fears, despite the fact that independent petroleum marketers are historically good credit risks. According to 1989 Small Business Administration Data, of 633 guaranteed loans to gasoline wholesalers since 1979 (SIC

Code 5171), the Agency has experienced a failure rate of only 11.8%. Under the current SBA loan guarantee program, a bank is still liable for 15% of the loan, and many banks are unwilling to take on even that risk.

PMAA recommends that the SBA be directed, when assessing the potential Superfund liability, to distinguish between clean-up for an underground storage tank for petroleum and that of a hazardous waste. SBA should also be encouraged to publicize that interpretation to banks. We believe such a positive approach would help ease the Catch-22 situation presently being experienced by marketers and help alleviate many of the banks' unfounded concerns. If SBA and its preferred lenders focus their attention on the payback of an 88.2% success rate over the years, rather than the collateral involved, they will find no reason to shy away from loans to tank owners.

We also urge the Committee to consider establishing within the SBA a small business environmental loan program that would be tailored to fit the needs of independent petroleum marketers. Such a program should apply to underground tank replacement, Stage II implementation, and other environmental measures that marketers must activate to comply with federal law. PMAA and its members have historically shied away from government assistance; marketers pride themselves on their independence and desire to minimize any reliance on government help. In the face of the recent increase in environmental regulations and laws, plus many which are currently being considered by the Congress, overwhelming financial burdens are being placed on small businesses. We urge this Committee to recognize this and act accordingly to assist small business in meeting these requirements. To do less could result in the wholesale demise of thousands of small businesses in our industry. We are ready to work with the Committee in this area.

Senator Max Baucus has introduced legislation, S. 2175, which would open up the LUST Trust Fund to provide loan guarantees for small business for the closure and replacement of underground storage tanks. PMAA supports this provision, but it currently is too narrowly defined to help many small businesses; our concerns are listed in a letter sent to Senator Baucus on March 1 (Attachment 2). Essentially, the proposed legislation fails to cover tank upgrades and release detection systems and rules out any tank owner with more than one facility. We implore the Committee to work with Senator Baucus to expand the definition in the bill of small business to mirror the definition of small business promulgated by SBA so a significant number of independent marketers can benefit.

FINANCIAL RESPONSIBILITY

As mentioned previously, the Congress enacted SARA in 1986. Section 205 of SARA directed the Administrator of EPA to develop regulations requiring owners and operators of USTs to demonstrate financial responsibility for a minimum of $1 million to cover the costs of cleanup and third party liability for releases from USTs. EPA issued these regulations in October of 1988. The regulations require owners and operators to meet their financial responsibility obligations on a staggered schedule based upon tank ownership. The first deadline applicable to independent petroleum marketers,

those who own between 100-999 tanks (Category II owners) is October 26, 1989. The second deadline, applicable to those who own between 13-99 tanks (Category III owners), is April 26, 1990. The third, applicable to those who own 12 or fewer tanks (Category IV owners), is October 26, 1990. The tank owners in Categories III and IV each received a one-year delay by EPA last Thursday; owners in those categories now have until October 26, 1991, and April 26, 1991, respectively.

EPA's action last Thursday leaves in place the October 26, 1989, deadline for owners of 100-999 tanks; we believe that owners in that category will continue to have difficulty meeting the financial responsibility requirements. Three critical factors -- (1) the difficulty in obtaining reasonably priced pollution liability insurance coverage, (2) the general status of the pollution liability marketplace, and (3) the unapproved status of state trust funds--all combine to make compliance for owners in Category II infeasible. PMAA believes that an additional delay in the Category II financial responsibility deadline is needed to allow these conditions to improve. We recommend that this delay be extended for at least one year, or better yet, until December 22, 1991, at which point the leak detection deadlines applicable to the oldest USTs, and all pressurized piping, will have gone into effect. If those deadlines are not extended, many mid-sized marketers will face a competitive disadvantage from both the majors, who are able to self-insure, and the smaller marketers, who have a one-year reprieve from purchasing insurance.

o Majority of Marketers Lack Coverage

Last December, the three associations representing independent gasoline wholesalers and retailers, the Petroleum Marketers Association of America (PMAA), the National Association of Convenience Stores (NACS), and the Society of Independent Gasoline Marketers of America (SIGMA), again surveyed their members in an effort to ascertain the insurance status of marketers subject to the October 1989, April 1990, and October 1990 deadlines. The combined results of these surveys, released on February 13, show that more than 60 percent of these owners and operators do not have pollution liability insurance. When broken down into size categories, the survey results show that approximately 48 percent of Category II owners (over 100 tanks) have no insurance. Conversely, while 52 percent of the Category II owners responding to the groups' surveys did indicate that they had insurance, the vast majority of them--77 percent--are insured by Petromark. Petromark recently stunned the industry by announcing that it would no longer issue new or renewal (for more than 60 days) coverage after February 7, 1990, according to a February 8, 1990, announcement released by that company. A second review of its financial situation by an actuarial firm has confirmed the adverse conclusions of the first review; Petromark faces liquidation unless it secures an undisclosed amount of additional capital. This is truly a devastating blow to the ability of petroleum marketers to obtain coverage for their USTs.

When asked why pollution liability insurance has not been obtained, survey respondents answered most often that the cost of coverage is unaffordable. According to the survey results, for marketers subject to the October, 1989 deadline, the average

premium has risen over the last 3 years by 310 percent. In 1988 their average premium was $27,680. By 1990 it had risen to $113,425.

Despite these dramatic increases, PMAA marketers have made diligent efforts, at no little expense, to obtain insurance coverage. Survey respondents report spending an average of 46 hours themselves in the last 12 months in the pursuit of insurance. Employees, agents and others expended an additional 70 hours dealing with the financial responsibility issue. Not surprisingly, time expense is related to size, with larger businesses reporting an average of 69 hours for the marketer and 126 hours for employees, for a total of almost 200 hours--equal to 10 percent of a full person year--in the effort to secure or retain coverage. Attachment 3 is a copy of the combined survey results. Attachment 4 is a copy of a February 8 letter Petromark sent to its policyholders.

o Insurance Scope and Capacity

According to an EPA list dated October 4, 1989, at that time, there were approximately eighteen companies writing pollution liability coverage for petroleum underground storage tanks. Since then, as mentioned previously, one of the major players in the pollution liability marketplace, Petromark, announced on February 8, 1990, that it could not continue to issue new and renewal coverage after February 7, 1990, pending a second review of its financial situation by an actuarial firm. Another company, Federated Mutual Insurance Company recently announced that it intended to withdraw from states that have enacted state trust funds (regardless of whether those trust funds have been approved by EPA), and from states that had not approved Federated's new policy. Federated's action, while perhaps understandable from a business point of view, eliminates a source of "wrap-around" coverage for those marketers who are required to demonstrate financial responsibility for the up-front deductibles established by their state trust funds. According to the joint survey conducted by PMAA, SIGMA and NACS, the vast majority of insureds represented by the three groups--88 percent--are covered by Federated and Petromark.

Furthermore, some of the companies on EPA's list offer pollution liability insurance coverage to only a few clients as a convenience to them, according to the American Insurance Association. Still another company, Environmental Protection Insurance Company (EPIC) has completely withdrawn from the pollution liability insurance market.

Of the fifteen companies remaining, only one, Oilmen's Insurance, has an established history in the underground storage tank pollution liability area. However, this company does not yet provide a policy that meets EPA's requirements. The rest are new to the field, and while their entry into the market is encouraging, not enough information about them is available to allow an adequate analysis of their underwriting capacity, responsiveness to claims, or a determination whether they are adequately capitalized. To our knowledge, only five of the eighteen companies on EPA's list (National Union/AIG; Federated; Fireman's Fund/Oilmen's Insurance; Evanston; and

Great American/Agricultural Excess and Surplus Company) are Best rated.* Only a minority of these companies write coverage in all 50 states.

In addition, while most of these companies indicate that their policies are "designed" to comply fully with EPA requirements, EPA has not approved any of these insurance policies, and legal experts differ about the validity of these claims.

Marketers in noncompliance with the financial responsibility requirements face a daunting array of state and federal penalties. The federal penalty for noncompliance under RCRA is as much as $10,000 per day. Under both state and federal law, marketers could also be subject to citizen suits for failure to comply. Marketers in noncompliance also face possible termination of supply contracts or the voiding of bank loan or other agreements which demand compliance with all applicable laws and regulations. Some marketers subject to the October 26, 1989, deadline have already been advised that they may not pull product from their supplier's terminal if they do not have the requisite amount of insurance coverage. EPA recently revised its enforcement policy to actively seek out noncomplying tank owners and operators. First to be targeted are those who operate in states with no trust fund legislation on the books. These states are Massachusetts, Rhode Island, New York, New Jersey, Maryland, West Virginia, Delaware, Kentucky, Indiana, Arizona, Washington, Idaho and Alaska. Later, EPA may focus on states with trust funds, to determine whether marketers there have purchased wrap-around coverage to fully comply with EPA's requirements.

o State Trust Fund Approval

Because insurance has become so expensive, state trust funds have been viewed by marketers as the only real alternative to insurance as a means of demonstrating financial responsibility. EPA regulations allow tank owners/operators to use state trust funds as a means to demonstrate compliance, but only if the state (1) submits to the EPA Regional Administrator a description of the state fund, along with a list of classes of USTs to which the fund will be applicable, and (2) provides to each covered owner/operator a letter or certificate describing the fund, within 60 days after the Regional Administrator approves it. Unfortunately, the process of approving state trust funds is proceeding much too slowly to allow marketers to use them as a financial responsibility mechanism.

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*Best has been assigning ratings to insurance companies for over 50 years. An A+ rating is the highest. Companies that are rated lower than a B should be closely scrutinized. Some companies may not be rated because they are new to the marketplace; Best will not review a company until it has been operated for a 3-year period.

As far as we have been able to determine, of the approximately 37 state trust funds in place today, only seven--Alabama, Georgia, Illinois, Iowa, Louisiana, Mississippi,

As far as we have been able to determine, of the approximately 37 state trust funds in place today, only seven--Alabama, Georgia, Illinois, Iowa, Louisiana, Mississippi, and Vermont have been approved by EPA. Seventeen states--Colorado, Connecticut, Florida, Kansas, Michigan, Minnesota, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma South Carolina, South Dakota, Tennessee, and Texas have submitted their trust funds for approval. Other states have had funds on the books for some time that are for the state's use only, so tank owners/operators cannot use them as a financial responsibility mechanism. These states are Maine, New Jersey, New York, Oregon and West Virginia. Additionally, Washington's program is a pool for reinsurance, not a trust fund.

Factors slowing down the approval process include delays in state submissions, and inconsistent policies at the Regional Administrator level. Some of the Regions require the development of regulations before a trust fund can be submitted for EPA approval, while others merely require a copy of the trust fund legislation. A final factor which, we believe, plays a large part in the delay in the approval process is EPA's failure to issue its guidance on acceptable state trust funds in a timely manner. Although the states acted quickly to enact legislation--approximately 20 states established trust funds in 1989--they have had to do so in the absence of formal guidelines from EPA regarding what the Agency considers to be an acceptable fund. EPA finally issued its guidelines in late November of 1989. Because of the delay in the release of EPA's guidelines, PMAA believes that a large number of trust funds will be found to be unacceptable, and the states will have to go back to the drawing board.

Lastly, in our view, the states that are interested in going the trust fund route have generally been the ones that have already been active in enacting legislation and seeking EPA approval. Several additional states remain actively involved in efforts to enact trust fund legislation, although they have had to resolve political and other problems along the way. For these states, we believe that a delay would not serve to postpone legislative action, but rather would give them additional time to address these roadblocks to action. However, some states that have not been willing to consider or enact trust fund legislation to date may never do so. We raise this point in answer to those who believe that delaying the effective date of the regulations will remove any incentive for the states to act quickly to consider trust fund legislation. When all is said and done, we believe that there will always be some states that will be unwilling to provide this critical environmental benefit to its citizens. For those states, we doubt that the existence of a deadline will have any affect one way or the other.

In view of the above, PMAA agrees with EPA's delay in the financial responsibility deadlines for Categories III and IV. A delay in the deadlines will allow marketers to invest their scarce resources in tank upgrades, replacements and monitoring, which are essentially, prerequisites to purchasing pollution liability insurance. This, in turn, should lead to a greater willingness by insurers to make available insurance at reasonable rates. A delay in the deadlines also provides additional time for the state trust fund approval process to work. And, since many state trust funds as currently drafted may not pass EPA muster under the Agency's review guidelines, a delay

As mentioned previously, PMAA supports EPA's decision to delay the effective date of the financial responsibility requirements and urges a similar delay of at least one-year, until October 26, 1990, for owners of 100-999 tanks.

o Should Congress or EPA Take Action?

As you know, EPA decided, shortly before the deadline went into effect, that it would not exercise its authority to delay the October 26, 1989, deadline. Several reasons were given by the Agency to justify this decision. In PMAA's view, the primary reason underlying the decision is EPA's belief that Congress, not EPA should take the responsibility for delaying the effective dates, since the Congress established the financial responsibility requirements in the first instance.

Obviously, the Agency acted last October as if it had the legal authority to go forward with its phase-in plan. If it had the authority then, it has the authority now to make a determination that, based upon the status of state trust funds, recent developments in the insurance market, and the fact that a majority of tank owners subject to the October 26, 1989, financial responsibility deadline are uninsured, the compliance date initially adopted is not adequate, and a delay for Category II is in order. EPA can make this determination to delay the effective date of the requirements.

In the absence of any action by EPA, it then becomes incumbent on the Congress either to order EPA to act, or to act on its own initiative to delay the financial responsibility requirements for the remaining Category II tank owners to avoid facing a collection of state and federal penalties as well as a competitive disadvantage.

o Leak Detection Implementation by Petroleum Marketers

There are some who have questioned PMAA's request for a delay in the financial responsibility requirements on the grounds that marketers allegedly are not acting responsibly to upgrade their underground storage tanks systems. However, according to the results of a survey recently conducted by PMAA, this concern no longer has a place in the financial responsibility debate. According to PMAA's survey results (see Attachment 5) a large majority of marketers have implemented leak detection programs at their underground storage tanks well in advance of EPA's requirements, which the Agency has phased in over a 5 year period.

As shown in Exhibit 1 of Attachment 5, a total of 86.9 percent of the survey respondents report having EPA-approved leak detection programs in place. Over 60 percent of the respondents indicate that they have a leak detection program covering all of their tanks; these respondents account for nearly 64 percent of total survey tanks. An additional 26.8 percent of respondents, accounting for nearly 34 percent of total tanks, report having leak detection at some UST sites. Only 2.7 percent of those surveyed report having no leak detection at their UST sites. We would note that those in this category tend to be very small, owning an average of seven tanks and averaging annual product sales of 2.5 million gallons or less. In addition, a majority of these respondents

category tend to be very small, owning an average of seven tanks and averaging annual product sales of 2.5 million gallons or less. In addition, a majority of these respondents plans to make significant investments for leak detection and tank upgrades in 1990, according to the survey.

The detection method of choice for 80 percent of respondents is manual inventory control plus tank testing. The second most popular method, chosen by 53 percent, is groundwater monitoring. (Overlap exists due the fact that many tank owners have implemented both options.)

A majority of marketers also has implemented leak detection for piping; as shown in Attachment 5, Exhibit 3, 41.7 percent of respondents indicate having leak detection for piping on all of their USTs. An additional 29.3 percent have detection for at least some of their sites.

PMAA's leak detection survey results also demonstrate that UST expenditures have risen steadily for four years, with the 1990 estimated expense averaging nearly $80,000 (for the 80 percent of respondents reporting a 1990 estimate). This is up from the 1989 average of $51,000 reported by 70 percent of the survey respondents. Taken together, the expense data collected on this survey would suggest that a conservative estimate would put marketer expenses on USTs at an average of over $30,000 per year per marketer for four straight years by the end of 1990.

It is also instructive to note that the majority of respondents that reported having no leak detection at their USTs also report plans to make significant investments in 1990. While few of these marketers indicated spending money in prior years, fully two-thirds said that they planned to spend an average of over $40,000 in 1990. Given the small size of these marketers, such sums are substantial and indicate the importance that they attach to upgrading their UST systems.

As small businesses, independent petroleum marketers do not have unlimited funds. PMAA's leak detection survey results show that they are taking their UST responsibilities seriously, and investing in activities that will have a palpable benefit to the environment. To ask these small businesses to make a similar level of investment in 1989 and 1990 to purchase insurance when other, less costly alternatives will be available in most states in the future results, we submit, in an insurmountable cost burden not commensurate with the risks posed. Finally, in considering whether marketers are truly burdened by the financial responsibility requirements, we hope you will also consider not only their UST compliance costs, but also the increased regulatory compliance costs imposed upon them pursuant to other statutory mandates. Reid vapor pressure controls, Stage II vapor recovery, community right-to-know and toxic reporting requirements, drug testing and hazardous materials transportation programs are all taking their toll on the independent segment of the petroleum marketing industry.

TECHNICAL STANDARDS

The Hazardous and Solid Waste Amendments of 1984 extended and strengthened the provisions of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act (RCRA) of 1976. One major portion of RCRA as amended, Subtitle I, provides for the development and implementation of a comprehensive regulatory program for petroleum underground storage tanks.

Under Section 9003 of Subtitle I, EPA was required to promulgate regulations applicable to all owners and operators of UST systems as necessary to protect human health and the environment. Section 9003(b) authorized the Administrator, in promulgating these regulations, to distinguish between types, classes, and ages of underground storage tanks. Section 9003 required EPA to issue design, construction, installation, and compatibility standards for new tanks, as well as requirements applicable to all tanks owners and operators concerning leak detection, recordkeeping, reporting, closure, corrective action, and financial responsibility. On September 23, 1989 the EPA issued final regulations to implement the mandates of Subtitle I (53 F.R. 37082). These regulations went into effect on December 23, 1989.

In developing an effective regulatory approach to petroleum USTs, EPA had to deal with several unusual aspects of the regulated community that created special problems for implementation and enforcement. According to the preamble of the September 23, 1989 rulemaking, these are as follows:

> First, the regulated universe is immense, including over 2 million UST systems estimated to be located at over 700,000 facilities nationwide. Second, over 75 percent of the existing systems are made of unprotected steel, a type of tank system proven to be the most likely to leak and thus create the greatest potential for health and environmental damage. Third, most of the facilities to be regulated are owned and operated by very small businesses, essentially "Mom and Pop" enterprises not accustomed to dealing with complex regulatory requirements. Fourth, numerous technological innovations and changes are now underway in various sectors of the UST system service community.

In view of these characteristics EPA had to develop a regulatory approach that was not only amply protective of the environment but also flexible enough to allow small businesses to comply without undue hardship. PMAA believes that, for the most part, EPA succeeded in achieving this goal.

o Leak Detection

The regulatory approach selected for the detection of leaks is, in a nutshell, one that requires the oldest tanks to apply leak detection within one year, and the newest no later than 5 years. Several leak detection options are provided. Pressurized piping is

subject to stringent leak detection requirements; it must be leak detected by December 22, 1990.

There are some who believe that EPA's regulatory approach for leak detection is not stringent enough, and that its phase-ins are too generous. However, PMAA disagrees. As EPA recognized in the preamble to the rule, a more rapid phase-in would have been difficult, if not impossible for the vast majority of the regulated community to meet. And, as PMAA's experience with Stage II vapor recovery requirements shows, a more rapid phase-in would have resulted in drastic shortages of capital, equipment and contractors, as 700,000 facilities nationwide struggled to comply. The age-based phase-in schedule ultimately adopted by EPA ensures that implementation of the leak detection requirements will take place in an orderly fashion that will spread out the demand for equipment and services and avoid bottlenecks. Most important, it gives higher priority to older, unprotected tanks, which have been found to have the greatest potential to leak.

o Upgrade Requirements/Single Wall Standard

The requirement that existing tanks must be upgraded to new tank standards, i.e. corrosion protected, single walled tanks with spill and overfill protection, is also phased in over a ten-year period.

PMAA strongly supports EPA's decision to apply one nationally applicable standard -- protected single-walled tanks with leak detection, plus an upgrading program for existing tanks -- to regulate both existing and new tanks. The Agency chose the single-walled approach over the proposed "two-tiered" approach, which would have required secondary containment at sites in proximity to drinking water resources, and protected single-walled tanks elsewhere. The protected single-walled, nationally applicable standard provides badly needed flexibility to, and has the least financial impact upon, small businesses. In addition, reliable field and industry evidence indicate that the protected single-walled tank approach will amply protect health and the environment.

The two-tiered approach, on the other hand, with its stringent secondary containment requirements, would effectively have doubled the cost of the compliance in affected areas, since the purchase and installation cost of double-walled tanks is roughly twice as much as that of protected, single-walled tanks (Weston Report, 1986). Yet, studies show that the high cost of double-walled tanks is not justified by any significantly greater leak protection benefits (53 Fed. Reg. 37102).

The two-tiered approach would have imposed severe burdens upon small businesses and would, we believe, have forced hundreds of small, independent petroleum marketers out of business, particularly in metropolitan or other largely populated areas in proximity to drinking water resources. The two-tiered approach would also unnecessarily have relegated the small business independent petroleum marketer to localities outside substantial population areas, leaving these areas to be served by large firms with greater financial resources. This would have a harmful effect on competition and been detrimental to the consuming public's best interest.

The protected, single-walled standard also is consistent with most state programs under development and is less complex than the two-tiered approach, and therefore most likely to maximize voluntary compliance. And, given the vast number of underground storage tanks affected by the proposal in the country, PMAA believes that it is critical to establish a regulatory approach that is as self-implementing as possible, consistent with protection of health and the environment. We believe that the protected, singled-walled standard achieves that careful balance, and urge in the strongest terms that EPA's decision in this regard not be altered by the Congress.

o Public Participation

Section 280.66 of the technical standards requires the implementing agency to provide an opportunity for public review and comment and allow for a public hearing if necessary, prior to approving a corrective action plan to clean up a release from an UST. PMAA has serious concerns about this requirement for two important reasons. First, it is in violation of the express intent of Congress. Second, it interferes with expeditious spill clean up.

During the course of the EPA's hearings, the Agency cited Section 7004 of RCRA as the source of authority for requiring public notice and hearings. However, Section 7004 was included in RCRA when the statute was originally enacted in 1976. The UST provisions -- Subtitle I -- were added much later in 1984, not because all RCRA provisions were deliberately intended to apply to petroleum or because RCRA was the perfect vehicle but because, politically, it was the only available environmental vehicle at the time. In fact, the 1984 Hazardous and Solid Waste Amendments specifically distinguish the UST program from RCRA Subtitle C through such means as 9003(b). When Congress reopened Subtitle I in 1986, it considered corrective action for petroleum in the context of establishing a trust fund. The concept of public notice and hearings for petroleum response related actions was specifically rejected when the House of Representatives defeated, during floor debate on Section 205 of SARA, an amendment by Congressman Bill Richardson that would have subjected every petroleum response action to notice and public hearing.

Furthermore, the requirement for public notice and hearings could result in major delays in remedying petroleum related leaks or spills. As a result, the regulations do not well serve one of the primary purposes of the underlying statute -- to provide for expeditious and effective remedial action. Particularly with lighter products which may migrate more quickly depending upon site specific conditions, time is of the essence in selecting and implementing the appropriate corrective action methodology. Delays can lead to increased costs and less effective recovery and restoration.

Accordingly, we would ask this Committee to consider clarifying legislation that would require public notice and the opportunity for hearings in any case where implementation of an approved corrective action plan does not achieve the established

clean up levels and termination of the plan is under consideration by the implementing agency.

SUMMARY AND RECOMMENDATIONS

In summary, PMAA is supportive of legislation and regulations designed to protect and preserve America's groundwater supply. Clearly marketers understand the importance of this as evidenced by the amount of money they have spent over the last three years and the amount of money they anticipate spending in 1990 on underground tank replacements, and leak detection. However, we believe there are several steps which can be taken to fine-tune the statutes applicable to UST related activities that will not only reduce the number of stations which may close as a result of these regulatory requirements, but also accelerate the level of tank replacement. Specifically, these recommendations include the following:

(1) Revise Section 205 of SARA and 40 CFR 280 to clarify lender liability issues;

(2) Revise Section 4081 (d)(2) of the tax code to extend the tax at its current financing rate of 0.1 cent per gallon for an additional period to allow the collection of the LUST tax beyond the current $500 million cap. Taxes attributable to the LUST Trust Fund financing rate are likely to reach that level by this summer, at which time the tax "triggers off".

(3) Revise Section 9508 (c)(1) of the tax code in accordance with proposed revisions to Section 9003 (h) of the Solid Waste Disposal Act, which would expand the list of uses for LUST Trust Fund monies. This revenue could be used to assist the states to assure the proper capitalization of their EPA-approved trust funds, so that the states have adequate monies to pay the costs of clean up. The revenue could also be used to create low-interest loan assistance programs to help the smallest marketers.

(4) Create a low interest environmental loan program for small businesses. This loan program would allow small businesses to avail themselves of capital to make the necessary changes in their businesses that are required by federal environmental statutes. The LUST Trust Fund could also provide the revenue to finance this program, which could be managed by the States under their UST programs;

(5) Delay the effective date of the financial responsibility requirements for owners of between 100-999 tanks for at least one year, until October 26, 1990, to allow the continued advancement of the state trust fund approval process, to allow

leak detection to their tank systems, and to allow the insurance industry additional time to settle and stabilize.

(6) Amend RCRA to clarify the requirements for public notification and hearings during the petroleum UST corrective action process in accordance with Congressional intent as expressed during the 1986 debate of Section 205 of SARA.

In closing, small businesses are the cornerstone of our nation's economy. In the case of petroleum marketers, they perform a vital service. Today's marketers are not asking for a bail-out or a hand-out at the public's expense. Rather, they simply ask that the environmental laws applicable to underground storage tanks be fine-tuned to allow them the chance to stay in business while operating in an environmentally safe manner.

Attachment 1

01-10-89 02:43PM M&T HOUSTON

M T

1800 Town Street
Houston, Texas 77006-3809

Mailing Address
P.O. Box 2461
Houston, Texas 77252-2461

713-575-XXXX

Mortgage and Trust, Inc.

January 10, 1989

VIA FAX

Jacksonville, Texas 75766

Re: M&T Loan No.

Teague, Texas

Dear Mr. :

The Lender stated January 5, 1989 they are not able to grant your request of increasing the principal balance to $300,000.00 and reamortizing the loan for 10 - 15 years. Based on the conversation, the reason for their decision is due to the loan being considered a hazardous loan because of the storage of the gasoline.

We are currently awaiting written documentation of the denial from the Lender. Upon its receipt, we will forward you a formal denial letter.

Should you have any questions, please contact our office.

Very truly yours,

Ann Harris

Ann Harris
Mortgage Service Officer
Commercial Loan Servicing

/ah

Attachment 2

National Association of Convenience Stores
Petroleum Marketers Association of America
Service Station Dealers of America
Society of Independent Gasoline Marketers of America

March 1, 1990

The Honorable Max Baucus, Chairman
Subcommittee on Environmental Protection
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The undersigned groups, representing nearly 75,000 independent, petroleum product wholesalers and retailers, wish to commend you for your initiatives regarding the critical issue of petroleum underground storage tanks and the associated financial responsibility requirements. The hearing you held on February 20 provided an excellent opportunity for the serious issues relating to the UST situation to be aired. Your prompt action in introducing S. 2175 to address these issues is a cause for great optimism throughout the entire petroleum marketing and convenience store industries.

We are particularly gratified that you have included a provision which would delay, for one year, the financial responsibility requirements currently imposed on owners of less than 100 tanks (classes III and IV). We would urge a similar extension as well for those owners in the 100-999 category (class II). The recent joint survey conducted by the National Association of Convenience Stores (NACS), the Petroleum Marketers Association of America (PMAA), and the Society of Independent Gasoline Marketers (SIGMA) show that only approximately 50 percent of the marketers with 100-999 tanks have the required coverage. Moreover, this situation will be considerably exacerbated by the recent announcement by PETROMARK that it was going to cease writing new coverage and would only extend the existing policies by 60 days, pending a review by a second actuarial firm. Over 77 percent of the marketers in the 100-999 class who have pollution liability insurance have insured with PETROMARK.

As you stated at the hearing and we fully recognize, the delay in the financial responsibility requirements is not sufficient to deal with all the problems facing marketers with their underground tanks. We commend you for going further in your proposed legislation by opening up the LUST trust fund to be used for loan guarantees for small businesses and for grants to those facilities providing "essential community service." However, we believe the specific provisions are drawn too narrowly and will not help a significant number of small businesses.

Specifically, "small business" is defined as the owner of a single underground tank or the owner of not more than 12 such tanks that are located at a single facility. This definition would effectively rule out any tank owner who had more than one facility. This eliminates from consideration a number of small rural retail outlet owners who may have two or three separate facilities.

In addition, one of the criteria applicable to becoming qualified as an "essential community service" is that not less than three private lending institutions have declined to provide a loan. This links the community service to the willingness of banks to make loans. What happens if the owner of the facility makes a determination that, even if the bank will lend the money, it is not economic to make the investment in the facility? Under this scenario, the facility would close and not be eligible for the 50 percent grant as an essential community service, even though such a grant may justify the marketer keeping the outlet open.

The final concern we would raise with your proposal is that it includes only tank closures or replacements in the list of items eligible for the loan guarantee. This appears to ignore completely tank upgrades and release detection. Under the EPA regulations marketers have up to ten years -- before 1998 -- either to replace the tank or to upgrade the tank to meet new tank standards. We would urge that tank upgrades be included in the list of items eligible for a guaranteed loan. Further, the federal tank regulations require all existing tanks to have a method of release detection in place between now and 1993 based on the tank's age. Sophisticated devices and methods are available, but in many cases they are quite expensive.

Again, we commend you for your efforts in this area. You have not only held hearings on this critical issue but also have offered a concrete proposal which hopefully will provide the basis for further action. As you know, time is of the essence, and we urge you to move expeditiously to markup of your bill. Each of the undersigned groups is more than willing to work with you and your staff to address the concerns outlined above, as well as other critical issues relating to underground tanks.

Sincerely,

Teri Richman, Senior Vice President
National Association of Convenience Stores
1605 King Street
Alexandria, Virginia 22314
(703) 684-3600

Phillip R. Chisholm, Executive Vice President
Petroleum Marketers Association of America
1120 Vermont Avenue, N.W., Suite 1130
Washington, D.C. 20005
(202) 331-1198

Joseph L. Koach, Executive Director
Service Station Dealers of America
499 South Capitol Street, S.W., Suite 407
Washington, D.C. 20003
(202) 479-0196

Jeffrey L. Leiter, Counsel
Society of Independent Gasoline Marketers
of America
1730 K Street, N.W., Suite 907
Washington, D.C. 20006
(202) 429-9333

Attachment 3

JOINT SURVEY OF GASOLINE MARKETER FINANCIAL RESPONSIBILITY

PETROLEUM MARKETERS ASSOCIATION OF AMERICA
NATIONAL ASSOCIATION OF CONVENIENCE STORES
SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA

Compiled by Ethel S. Hombeck
February 13, 1990

SUMMARY

A joint survey effort recently completed by the three major associations representing independent gasoline wholesalers and retailers points to the continuing crisis in the pollution liability insurance market. The Petroleum Marketers Association of America (PMAA), the National Association of Convenience Stores (NACS) and the Society of Independent Gasoline Marketers of America (SIGMA), each surveyed its membership in late 1989 on pollution liability insurance coverage and costs. The combined survey results clearly show that, despite the phase-in of EPA's financial responsibility deadlines, pollution liability insurance remains out of reach for the majority of gasoline marketers.

Over 60 percent of respondents do not carry PLI, most because it is simply unaffordable. Even accounting for the handful of respondents able to use noninsurance means of demonstrating financial responsibility (e.g. letters of credit and self insurance), and those relying on EPA-approved state trust funds, there remain approximately 41 percent without any type of coverage. Overall coverage for tanks is also low; survey respondents report that fewer than one-third of their USTs are covered by PLI.

The insurance situation described in this report is bound to deteriorate rapidly with the surprise announcement by Petromark that it will cease writing new policies (and only renew existing policies expiring after February 7 for 60 days) pending a financial review. Survey results show that 49 percent of insured respondents and over 77 percent of large tank owners are insured by Petromark. Given that Federated, which insures another 40 percent of respondents, has curtailed operations, it becomes all the more imperative that some action be taken to relieve marketers of a burden that they can no longer begin to control.

The joint survey also illustrates the explosion in PLI costs that has occurred in tandem with EPA's regulatory phase-in. PLI premiums in 1990 reportedly will average nearly $57,000 per marketer, up 156 percent from 1988 levels. The most precipitous premium increase was reported by large tank owners, who will pay an average of more than $113,000 in 1990, an increase of over 300 percent from 1988 premiums.

Evidence of the regressive nature of PLI costs is also provided by the joint survey; while the 1990 per tank cost to owners of 100-999 tanks is an estimated $633, owners of fewer than 13 tanks report paying an average of $1,541. Similarly, large marketers will incur increased operating costs of 0.27 cents per gallon as a result of PLI premiums, roughly one-third of the 0.76 cent per gallon cost to small tank owners. The financial responsibility regulations, therefore, are not only costly, they are anticompetitive.

All marketers, regardless of insurance status, have spent a great deal of time dealing with the entire financial responsibility issue. On average, marketers spent 46 hours of their own time and paid for another 70 hours of employee time in the effort to secure or retain insurance coverage. Large marketers spent even more time, a total of 200 hours for themselves and others, the equivalent of 10 percent of a full person-year dealing with this one troublesome issue.

Finally, the survey provides additional information about a trend in evidence across the country, the widespread closing of service stations that has resulted from EPA's tank regulations. Fifty-three percent of survey respondents report closing an average of 3.8 stations over the past 2 years, and nearly 61 percent report plans to close another 3.6 outlets. Taken together, survey responses suggest that around 17 percent of all surveyed outlets will have closed over a four-year period as a direct result of EPA's UST regulations.

JOINT SURVEY OF GASOLINE MARKETER FINANCIAL RESPONSIBILITY

INTRODUCTION

In late 1989, the three associations representing gasoline wholesalers and retailers each conducted a survey of its members in order to obtain current information on pollution liability insurance coverage and costs for underground petroleum storage tanks (USTs). This report represents the combined results of the efforts by the Petroleum Marketers Association of America (PMAA), the National Association of Convenience Stores (NACS), and the Society of Independent Gasoline Marketers of America (SIGMA).

The joint survey effort is intended to provide an assessment of the impact of EPA's financial responsibility regulations on gasoline marketers and the gasoline market. Furthermore, it is designed to assess the success or failure of marketers in procuring financial responsibility coverage as EPA's deadlines expire; as of October 26, 1989 owners of 100-999 underground storage tanks (USTs) were required to obtain financial responsibility, and owners of 13-99 tanks face a deadline of April 26, 1990. Survey results will, among other things, test EPA's thesis that forcing the demand for insurance will create a supply. The effect of EPA's regulations on insurance costs also will be addressed. The following sections present the results of the joint marketer financial responsibility survey.

SURVEY PROFILE

Survey results are based on nearly 700 responses received from PMAA, NACS and SIGMA members nationwide. As shown in Exhibit 1, the joint survey includes responses from a wide spectrum of petroleum sellers with the results providing an appropriate balance between large and small businesses. While PMAA's members account for 64 percent of total surveys, because these are the smaller marketers, they account for only about one-quarter of surveyed tanks and outlets. Conversely, SIGMA's surveys make up only 13 percent of the total, but account for close to one-half of surveyed tanks and sites. NACS, whose members fall in the middle based on size, provides 23 percent of total responses but, like PMAA, accounts for about one-quarter of tanks and outlets.

INSURANCE COVERAGE

Approximately, 40 percent of the marketers responding to the three surveys have a PLI. Of the 60 percent who do not have PLI coverage, only a few have been successful in satisfying the EPA regulations in other ways, primarily through state trust funds. However, while about 19 percent of respondents reported that they are relying on a state trust fund to meet EPA's financial responsibility requirements, only about 5 percent are in states which have an EPA-approved fund. (Almost 11 percent are in states that have submitted trust fund plans to EPA but have not yet obtained approval and the remaining 3 percent are in states that either have no fund or have a plan that has not been submitted to EPA.) About 2.5 percent actually use another, legitimate means of satisfying the requirements (most of whom are very large businesses able to self-insure). At best, then, an estimated 41 percent of marketers are completely without pollution liability protection.

As illustrated in Exhibit 2, slightly more than one-half of all large tank owners (those who own 100-999 tanks) are covered by PLI. Despite the passing of EPA's October deadline, therefore, 48 percent of these marketers still lack insurance. Among owners of 13-99 tanks, who are facing

the April deadline, only 43 percent indicate having a PLI, and just over one-quarter of the smallest respondents have insurance.

Tank coverage also tends to be low, in part because even marketers with insurance are unable to cover all of their tanks. Only 32 percent of surveyed tanks are covered by a PLI policy. Excluding tanks owned by the very large marketers who self-insure, 44 percent of surveyed tanks have coverage. Significantly, less than one-half of the tanks owned by marketers in the 100-999 category are covered by insurance; although these respondents make up only 19.5 percent of survey responses, they account for over 47 percent of total surveyed tanks.

A full two-thirds of the marketers without insurance cited cost as a major reason for not obtaining coverage. Seventeen percent indicated that insurance is simply not available to them, while 22 percent said that their tanks and/or sites do not meet the insurer's underwriting or upgrading requirements. About one-third of the uninsured cited state trust funds as a reason for not carrying PLI (although, as outlined earlier, most are not in states with an approved fund) and less than five percent reported using some other means of satisfying EPA's requirements. Most of these are very large businesses able to self-insure. Obviously, then, the insurance alternatives detailed in EPA's regulations are, practically speaking, not a factor.

INSURERS

Contradicting EPA's theory that creating a large demand for PLI would generate supply by attracting more companies to the business, there have been, for all intents and purposes, only two companies writing policies across the country. As illustrated in Exhibit 3, about 49 percent of respondents to the three surveys is insured with Petromark, 40 percent have a policy from Federated, and 11 percent gave miscellaneous answers. Large marketers clearly have favored Petromark, as over 77 percent of the owners of 100-999 tanks carry a Petromark policy.

Given these results, it is clear that Petromark's February 8 announcement that it "can not continue to issue new and renewal coverage in the ordinary course" pending review of its financial situation, has dramatic consequences for the nation's PLI situation. Since Federated, the only other insurer available to marketers, has already curtailed its operations, extent of coverage described in this report is bound to decline precipitously in the near future.

INSURANCE COSTS

The huge and ever-increasing cost of PLI remains a major impediment to more widespread insurance coverage. As illustrated in Exhibit 4, survey respondents estimate that 1990 premiums will average $57,000, an increase of over 150 percent from 1988 levels. More precipitous is the 309 percent increase projected by the owners of 100-999 tanks, whose 1990 premiums are expected to average over $113,000.

PLI costs are not just large, and not just on a perpetual incline, they are also highly regressive, as shown in Exhibit 5. Although the per tank cost is expected to average close to $1,400 for all respondents, among owners of 100-999 tanks the cost will average just over $600. While the smallest marketer is incurring operating cost increases of .78 cents per gallon, the larger tank owner faces a cost only about one-third as large, at an average of .27 cents per gallon.

It is important to note that despite the enormous cost of insurance, not all insured

marketers have a policy which meets EPA's requirements. Nearly one-quarter of the respondents with insurance indicated that their policy does not satisfy the financial responsibility regulations.

Clearly, insurance costs will raise operating expenses for marketers able to obtain insurance. Perhaps not as clear is the fact that all marketers, regardless of insurance status, have also spent a great deal of time and incurred expenses in the effort to obtain coverage. Respondents report spending an average of 46 hours themselves in the last 12 months in the pursuit of insurance. Employees, agents and others expended an additional 70 hours dealing with the financial responsibility issue. Not surprisingly, time expense is related to size, with larger businesses reporting an average of 69 hours for the marketer and 126 hours for employees, or a total of almost 200 (equal to 10 percent of a full person-year) in the effort to secure or retain coverage.

STATION CLOSURES

Observers across the country have noted the demise of the corner gas station, and have watched as tanks are removed and motor fuel sales ceased at outlet after outlet. In fact, the joint survey shows that the majority of gasoline marketers is involved in closing retail outlets. Fifty-three percent of survey respondents report closing at least one station over the past two years and nearly 61 percent report plans to close outlets over the next two years. Those who have closed stations report an average of 3.8 closures and those with plans to close more will average another 3.6. Stated differently, survey responses suggest that around 17 percent of all surveyed outlets will have closed over a four-year period as a direct result of EPA's UST regulations.

EXHIBIT 1
PROFILE OF SURVEY RESPONDENTS AND DISTRIBUTION OF RESPONSES BY ASSOCIATION

	ALL	PMAA	NACS	SIGMA
Average Tanks Owned	98.3	42.9	105.1	353.1
Average Outlets Owned	24.0	9.6	26.2	89.5
Average Sales (million gallons)	32.9	9.6	25.2	163.6
Percent of Total Responses	100.0	64.2	22.6	13.2
Percent of Surveyed Tanks	100.0	27.9	24.3	47.8
Percent of Surveyed Outlets	100.0	25.7	24.7	49.6

EXHIBIT 2
DISTRIBUTION OF RESPONSES AND INSURANCE COVERAGE
BY MARKETER SIZE

	ALL*	Owners of 100+ Tanks	Owners of 13-99 Tanks	Owners of < 13 Tanks
Percent of Respondents Covered by PLI	39.6	52.3	43.4	25.9
Percent of Tanks Covered by PLI	32.2	48.5	36.4	26.1
Percent of Total Respondents	100.0	19.5	50.2	29.7
Percent of Total Surveyed Tanks	100.0	47.3	24.0	1.9

*Includes respondents with more than 999 tanks who self-insure; if tanks owned by these respondents are excluded from the total, 44 percent of surveyed tanks are covered by PLI.

EXHIBIT 3
POLLUTION LIABILITY INSURANCE COMPANIES
BY MARKETER SIZE
(Percent of Insured Marketers)

	ALL	Owners of 100+ Tanks	Owners of 13-99 Tanks	Owners of < 13 Tanks
Petromark	48.8	77.3	44.1	23.4
Federated	40.2	12.1	44.1	68.1
Other	11.0	10.6	11.8	8.5

EXHIBIT 4. AVERAGE INSURANCE COSTS
BY MARKETER SIZE, 1988-1990
(Thousands of Dollars)

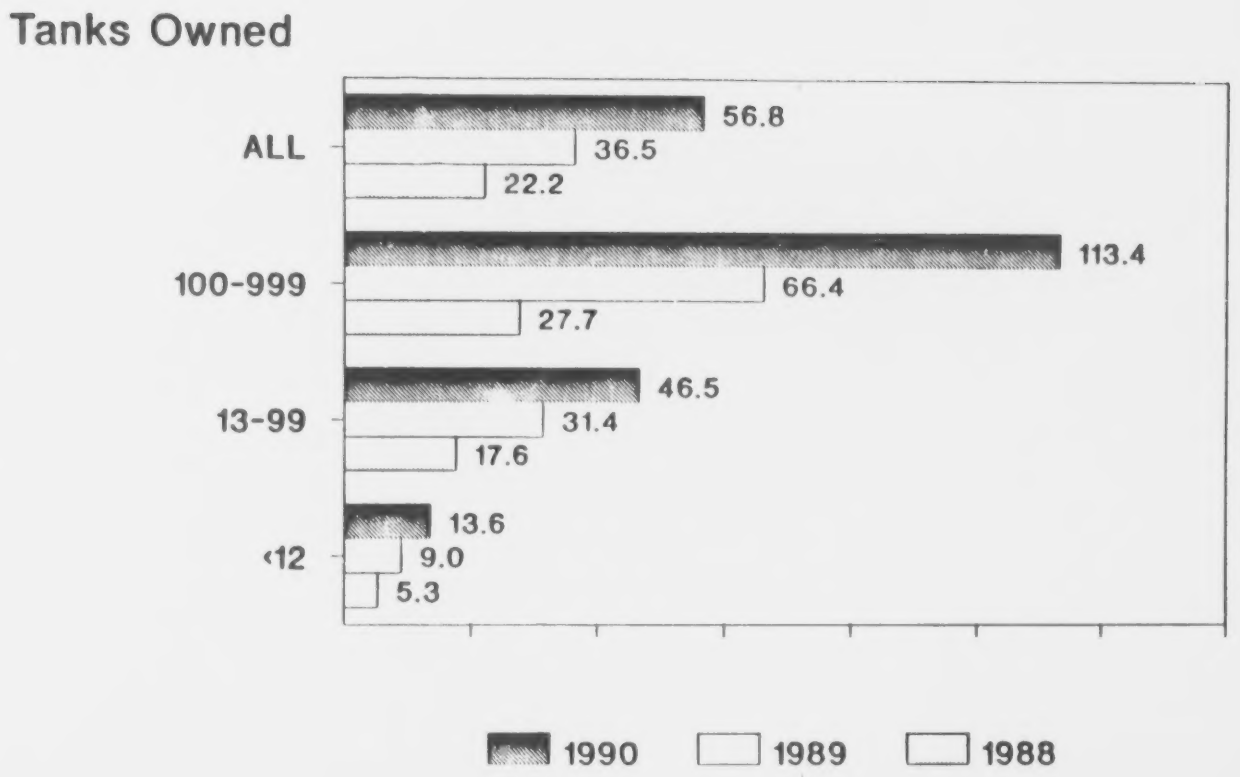


EXHIBIT 5
1990 INSURANCE COSTS, BY MARKETER SIZE

	ALL	Owners of 100+ Tanks	Owners of 13-99 Tanks	Owners of < 13 Tanks
Average Premium Per Tank ($)	1,369	633	1,450	1,541
Average Premium Per Site ($)	4,569	2,117	4,970	6,541
Average Cost Per Gallon (c/g)	0.55	0.27	0.61	0.78

Attachment 4

petromark
Petroleum Marketers Mutual Insurance Company
A Risk Retention Group

February 8, 1990

RE: PETROMARK - URGENT

Dear Policyholder:

I have some very bad news to report. In short, the Board was shocked to learn last week from Wyatt and Co., Petromark's actuaries, that the December 31, 1989 financial statement reserves which Wyatt projects are needed to pay for outstanding claims are nearly three times the reserves that have been established on a case by case basis by Petromark's claims managers.

I say the Board was "shocked" because, until last week, the actuaries, in their regular quarterly reviews of Petromark's claim reserves, had recommended financial statement reserves that did not substantially exceed the case basis reserves, and the Board had no previous indication that a financial reserve increase anywhere near the magnitude now recommended by Wyatt would be needed.

The Board is not fully satisfied with the explanation for the abrupt turn-about, which appears to lie in some loss development trends Wyatt now believes will emerge. The Board therefore has taken immediate action to hire Tillinghast, a well-known national actuarial firm, to provide a second opinion.

If the new Wyatt view were correct, then Petromark would change from a positive net worth of about $9.5 million to a negative net worth of about $10.5 million, as of December 31, 1989. Even though future investment income on reserves would reduce (and conceivably could eliminate) the shortfall, in the circumstances Petromark can not continue to issue new and renewal coverage in the ordinary course while it waits for a second opinion from Tillinghast.

Petromark has discussed its financial situation with the Tennessee Insurance Department, and pursuant to an agreed order of supervision and pending the receipt of the Tillinghast opinion, it only will offer renewal coverage of a sixty-day duration for policies with anniversaries after February 7. Rates for this coverage, which have been increased from 1989 levels in accordance with Wyatt's recommendations in November, have been provided by separate quote.

Of course, policyholders will have the option not to renew and will need to consider the present uncertainty surrounding Petromark. No new members will be accepted until circumstances warrant.

Pollution Liability Insurance
2601 Elm Hill Pike • Suite J, Nashville, Tennessee 37214 • (615) 889-5823

Petromark expects to have a report from Tillinghast within thirty to forty-five days, and Petromark will provide a further report to policyholders at that time on the state of Petromark and whether or not coverage will be continued.

I should note that if Tillinghast confirms Wyatt's views, the state insurance regulators probably would have to take control of Petromark (and liquidate it), unless Petromark secures additional capital from its policyholders. Depending on the outcome of the Tillinghast report, Petromark may need to ask its policyholders for such additional capital.

The Board continues to believe that Petromark must survive because:

(1) Petromark is a mutual company which does not seek to make a profit from the business it writes;

(2) Petromark has operated at very competitive expense levels;

(3) Unlike a commercial insurance carrier, any surplus funds generated by Petromark would be used to benefit the policyholders;

(4) If Wyatt is now correct and our projected losses have exceeded our earned premiums, then our premiums (which had previously been recommended by Wyatt) should have been higher to start with, and there is no commercial insurer which could reasonably provide the coverage made available by Petromark for a lower premium;

(5) It is not clear that the commercial insurance market will be available to take Petromark's place, and many Petromark insureds are now <u>required</u> by the EPA to have the coverage.

I hope you see the value of our program. While others have stood on the sidelines requesting regulatory relief, we have done our very best to provide an insurance program which meets the needs of petroleum marketers. I can assure you that your Board of Directors is making every effort to allow Petromark to succeed.

Yours Sincerely,

S Blankinship

Scott F. Blankinship
President

PETROLEUM MARKETERS MUTUAL INSURANCE COMPANY,
A RISK RETENTION GROUP

NOTICE OF CANCELLATION

February 8, 1990

You have been notified by letter dated February 8, 1990, that pursuant to an order of supervision of the Tennessee Department of Commerce and Insurance, Petromark will only offer renewal coverage of a sixty-day duration for policies with anniversaries after February 7.

You are hereby notified that, in accordance with that notice and the applicable supervision order, should you renew coverage under the Petromark Policy identified below, such coverage and any and all endorsements relating thereto shall terminate effective as of 12:01 a.m. standard time, on the date which is sixty days after the Policy Expiration Date shown in the label below, at the address of the insured also shown in the label below.

Authorized Representative

Attachment 5

PMAA PETROLEUM MARKETERS ASSOCIATION OF AMERICA

1120 VERMONT AVENUE, NW • SUITE 1130 • WASHINGTON, DC 20005
(202) 331-1198

PETROLEUM MARKETERS ASSOCIATION OF AMERICA

LEAK DETECTION

SURVEY RESULTS

Ethel S. Hornbeck
October 25, 1989

LEAK DETECTION SURVEY RESULTS

INTRODUCTION

PMAA's leak detection survey is one of a series of data collection efforts initiated by PMAA in order to provide up-to-date information on the current status of the nation's underground storage tanks (USTs). These projects have addressed: the characteristics of UST owners and their tank systems; the status of upgrades; and the nature of their financial responsibility coverage. These efforts are designed to develop an information base about marketer tank owners and their tanks, and to educate policymakers on the need to delay implementation of EPA's financial responsibility requirements.

The current focus on leak detection was prompted by concerns that tank owners and operators have not moved quickly enough in establishing leak detection programs at their USTs. As the following survey results will demonstrate, this concern no longer has a place in the debate on financial responsibility; nearly all marketers have implemented some type of leak detection program, and the vast majority have plans to make continued expenditures in the near future.

THE SURVEY

Responses PMAA's leak detection survey was sent to a random sample of 2000 marketers on September 5, 1989. Within six weeks, these marketers returned approximately 300 useable surveys, for a healthy 15 percent return rate. Responses were received from marketers in 43 states, with the distribution providing a fairly accurate cross section of PMAA's member marketers.

Respondents Survey respondents reported owning or operating an average of 41 USTs. The actual number of tanks reported by each marketer varied considerably, ranging from 2 to 625 tanks. The total number of tanks owned by respondents to this survey is approximately 12,200.

Product sales for respondents in 1988 averaged approximately 10 million gallons, which is representative of the target population of all UST owner/operators. Although the average marketer sells around 8.8 million gallons annually, motor fuel marketers, which own the bulk of marketer USTs nationwide, sell approximately 10.9 million gallons each year.

LEAK DETECTION

Tanks Under regulations issued in September 1989 by the U.S.

30-365 O - 90 - 6

Environmental Protection Agency (EPA), underground storage tanks must by equipped with leak detection within five years starting with the oldest systems first:

If the tank was installed...	It must have leak detection by December of...
before 1965 or unknown	1989
1965-1969	1990
1970-1974	1991
1975-1979	1992
1980-Dec. 1988	1993

Approved methods of leak detection include: (1) ground water monitoring; (2) vapor monitoring; (3) interstitial monitoring; (4) automatic tank gauging; and (5) a combination of monthly inventory control and tank tightness testing, for a 10-year period.

The vast majority of marketers report having an UST leak detection program in place. As shown in Exhibit 1, a total of 86.9 percent of respondents report having EPA-approved leak detection for at least some of their UST sites. Over 60 percent of marketers indicated that they have a leak detection program covering all of their tanks; these respondents account for nearly 64 percent of total surveyed tanks. An additional 26.8 percent of respondents, accounting for nearly 34 percent of total tanks, reported having leak detection at some UST sites.

While a total of 13.1 percent indicated that they have no formal leak detection program, closer examination of the data reveals that the majority of these marketers reported using at least manual controls. Although manual control without tank tightness testing does not meet EPA requirements, it is nevertheless encouraging that these tank owners have demonstrated an awareness of the need for leak detection. As Exhibit 1 shows, this leaves only 2.7 percent of marketers with no leak detection at their UST sites. It is also worth noting that the 2.7 percent of respondents with no leak detection at their USTs tended to be very small; these marketers own an average of 7 tanks and have annual product sales averaging 2.5 million gallons.

PMAA's leak detection survey asked marketers to identify both the leak detection methods that they use and to indicate the number of tanks covered by each. As shown in Exhibit 2, nearly three-quarters of the total surveyed tanks are covered, at a minimum, by leak detection in the form of tank tightness testing and manual inventory control. Over 80 percent of respondents reported using this method, while an additional 10 percent indicated that they used only manual controls. The second most popular method, groundwater monitoring wells, is used by 53 percent of respondents and is employed at over 28 percent of surveyed tanks. Only 0.5 percent of surveyed tanks are owned by the respondents reporting no leak

detection use.

That marketers are concerned about having adequate protection against leaks is highlighted by the fact that many respondents report using more than one type of detection control on their tanks. (Arithmetically this is illustrated by the fact that the percentages in Exhibit 2 sum to more than 100 percent.) For example, many respondents reported using tank tightness testing and manual controls for their tanks while also employing one or more of the other methods. The most common combination is manual control/tank tightness plus groundwater monitoring wells, which is apparently used on about one quarter of all surveyed tanks.

Piping EPA's regulations also phase in leak detection for piping. Different requirements apply to pressurized and suction piping. Pressurized piping is subject to more stringent requirements because it can pose a greater environmental threat in the event of a leak due to the specifics of its construction and operation. Accordingly, all existing pressurized piping must have leak detection in place by December, 1990.

Approved methods of leak detection for piping include automatic line leak detectors plus either an annual line tightness test or monthly monitoring. Suction piping is required to have leak detection according to the same schedule set forth above for tanks, unless it is exempt from leak detection due to its fail-safe construction. Approved methods of leak detection for piping not exempt from the requirements are either a line tightness test every three years, or monthly monitoring.

The majority of marketers also have implemented leak detection for piping; as shown in Exhibit 3, 41.7 percent of respondents indicated having leak detection for the piping on all of their USTs. An additional 29.3 percent had detection for at least some of their sites.

Although it would be helpful to know what type of piping these marketers own (particularly since pressurized piping must have leak detection in place by the end of 1990) the majority of respondents reported having both suction and pressurized piping at their outlets. Only 17 percent had pressurized piping, and the remaining 19 percent reported owning only suction piping.

Exhibit 4 illustrates that the most popular method of leak detection for piping is automatic line leak detection, employed by over 55 percent of respondents with a detection program. This is followed by line tightness tests, used by 40.9 percent, and monthly monitoring, selected by 31.5 percent.

EXPENSES

Although the survey was designed to collect data from marketers

on their expenditures for leak detection equipment and services only, the majority of money estimates provided by respondents clearly included UST purchase and installation expenses as well. Therefore, while it is not possible from these results to estimate marketer expenditures on leak detection alone, these data do provide another indication of the vast sums of money being spent on UST systems in general.

Survey results demonstrate that UST expenditures have risen steadily for four years, with the 1990 estimated expense averaging nearly $80,000 (for the 80 percent of respondents reporting a 1990 estimate). This was up from the 1989 average of $51,000 reported by 70 percent of the survey respondents. Taken together, the expense data collected on this survey would suggest that a conservative estimate would put marketer expenses on USTs at an average of over $30,000 per year per marketer for four straight years by the end of 1990.

It is also instructive to note that the majority of respondents that reported having no leak detection at their USTs also report plans to make significant investments in 1990. While few of these marketers indicated spending money in prior years, fully two-thirds said that they planned to spend an average of over $40,000 in 1990. Given the small size of these marketers, such sums are substantial and indicate the importance that they attach to upgrading their UST systems.

EXHIBIT 1
Leak Detection Coverage
(Percent of Marketers)

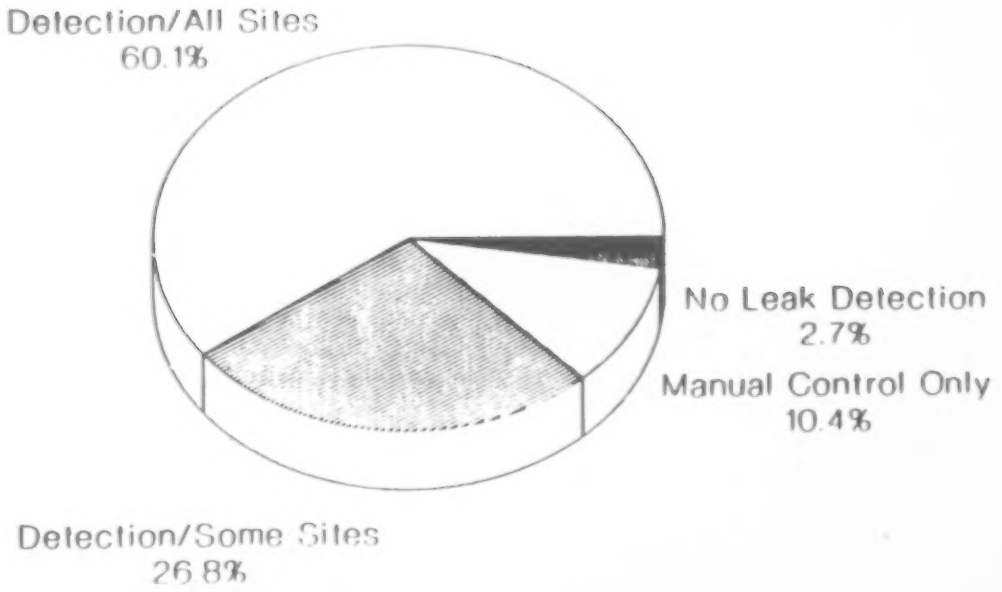


EXHIBIT 2

Leak Detection Methods Used

(Percent, By Detection Type)

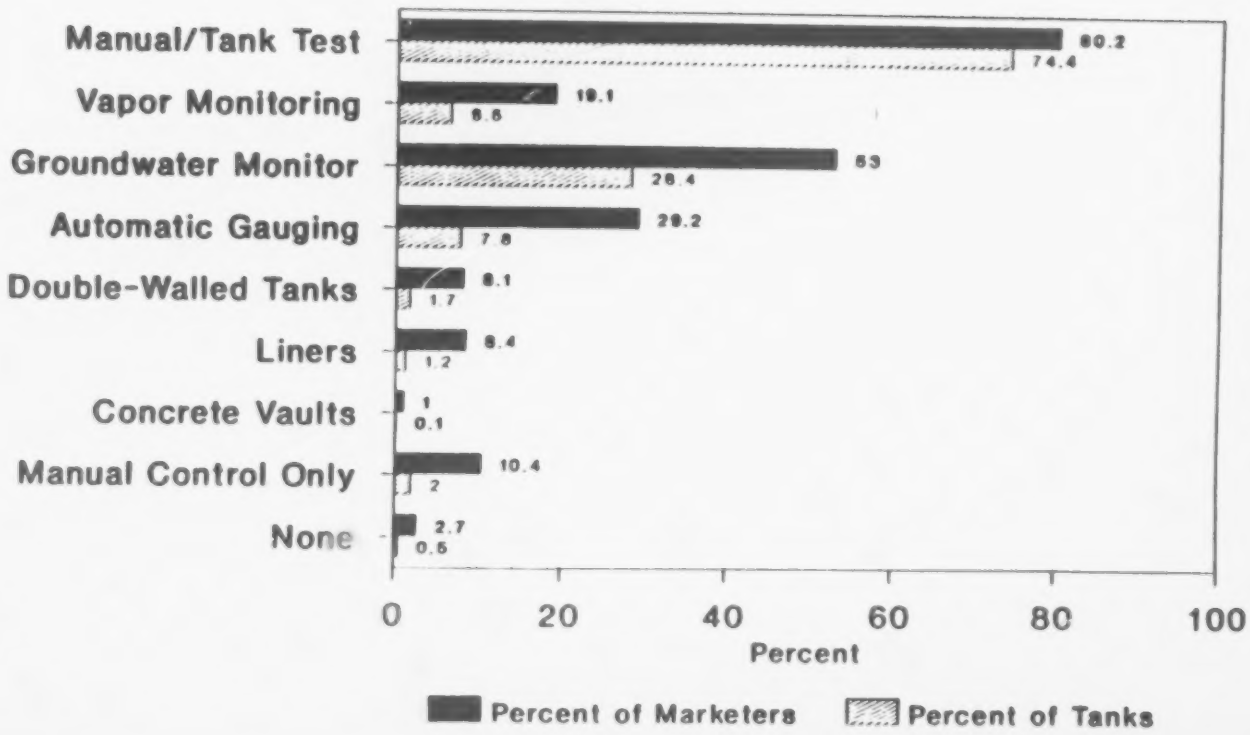


EXHIBIT 3

Leak Detection Coverage for Piping

(Percent of Marketers)

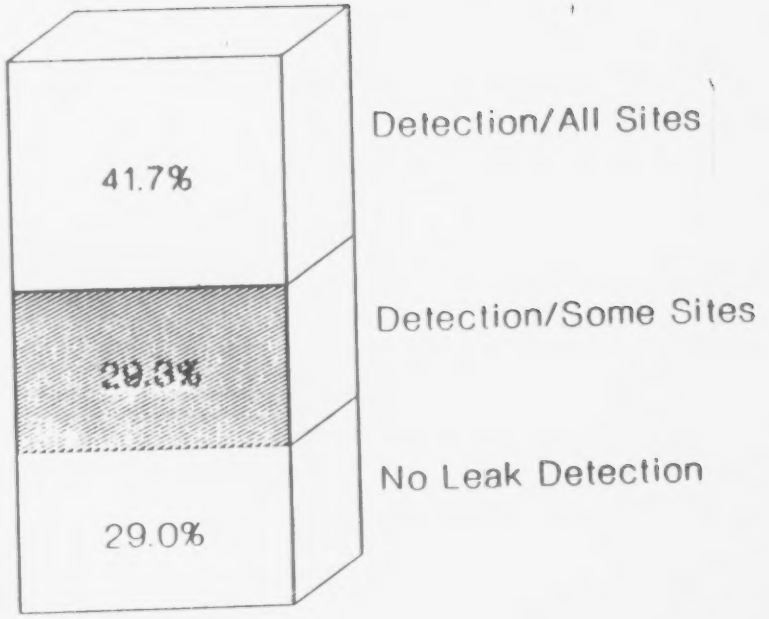
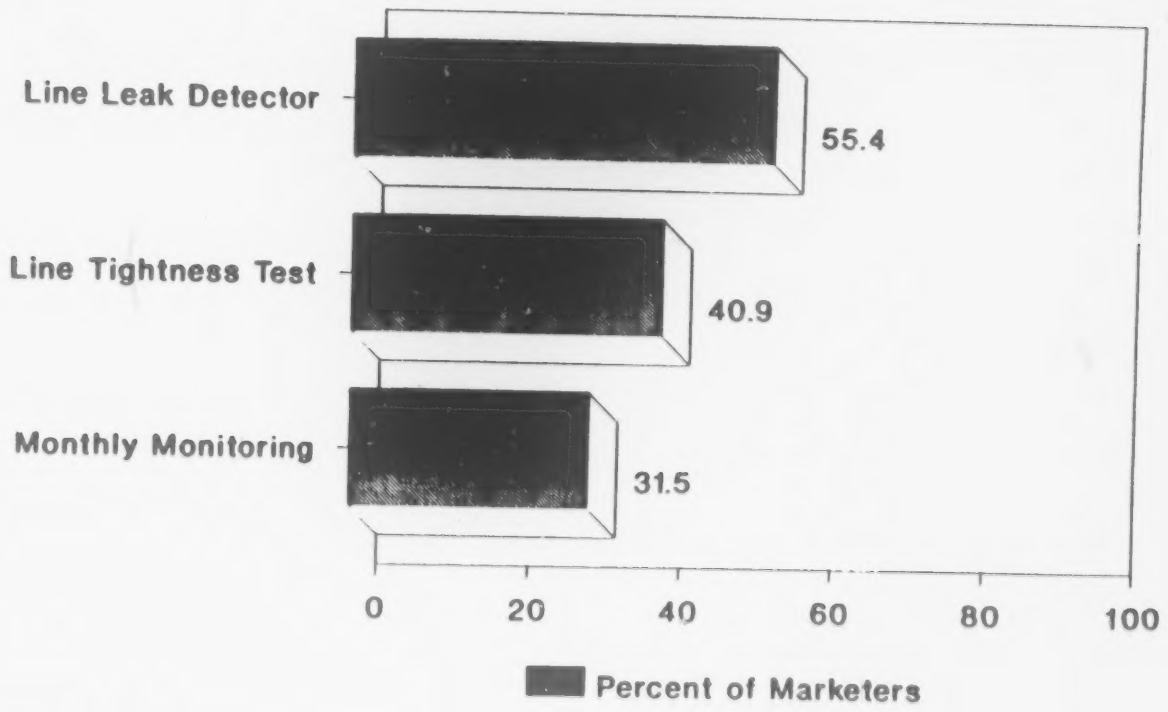


EXHIBIT 4

Leak Detection Methods Used for Piping



Based on responses from those marketers with leak detection for piping.

Senator BOSCHWITZ. I thank you for your testimony. I am sorry that the gentleman from the EPA was not in to listen to the testimony. But I would say to the gentleman, Sammy, from the EPA that one of the problems that Mr. Troutwine has pointed out is that in the event the legislature of my State, Minnesota, does not act soon—and they are going out of session here pretty pronto—what is the likelihood they are going to act?

Mr. TROUTWINE. Well, the likelihood that they will pass what is in there is good. As a matter of fact, we are fairly sure it will. They do not know if it is approved by the EPA. It is a likelihood that we will get the $1 million——

Senator BOSCHWITZ. But then they will not go back into session until next year. And as you consider these various State plans and as you consider extensions, you ought to look at how often State legislatures meet. Ours meets a little more frequently than some. So, it is important that the extension, while it is a year, may not have much impact, particularly when it is given at the last moment because some State legislatures probably—most begin at the beginning of the year—have adjourned and will not show up again for another year, or in some cases two.

Now we will turn to Mr. Roberts.

STATEMENT OF F.C. "TALLY" ROBERTS, JR., ACME PETROLEUM & FUEL CO., INC., GASTONIA, NC, REPRESENTING THE SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA AND THE NATIONAL ASSOCIATION OF CONVENIENCE STORES

Mr. ROBERTS. Thank you, Senator, for having us come to talk to you about this problem, some of which I think is utterly ridiculous.

My name is Tally Roberts and I, like Mr. Troutwine and Mr. Coulson—the name of our company is Acme Petroleum Fuel Co. from Gastonia, NC. I appear today on behalf of two other trade associations called SIGMA, which is the Society of Independent Gasoline Marketers, and NACS, National Association of Convenience Stores.

Acme, which is a family-owned business, was started in 1935 by my father, and we own and operate tanks in 125 outlets in North and South Carolina. My company is a member of both of our trade associations. Acme is what we consider to be a small business. It is not the typical NACS member in particular because most of the NACS members are smaller firms.

I should point out that we, through these two trade associations, have some 52,000 retail gasoline outlets, selling some 40 percent of the gasoline. We have a lot of cross-membership like myself. I belong to the same trade association that just testified.

I will summarize some of the things that I believe are important issues for this Committee——

Senator BOSCHWITZ. How many owners in the 52,000 retail outlets? That includes the big one, like 7-11?

Mr. ROBERTS. There are about 300 members in SIGMA, and 1,350 members in NACS.

I had three things that I would like to comment on. One is the issue that was just discussed, the financial responsibility situation, the small business problems in coming in compliance to the new

tank regulations in reference to financing, which is a necessary ingredient for staying in business, and several areas which we think could be some legislative improvements.

We sincerely appreciate the efforts of this panel in getting the EPA to hold off on some of the compliance dates. However, the tank owners 101 to 999, as testified here by Mr. Coulson—we are flying the flag upside down. Just because October 26 went by, we still do not have the problem solved.

And I would like to make an off-the-record comment from the standpoint of my written testimony. According to our records, there are five companies that are—and one operates only in some States. So, there are four players, one of which right now is not writing insurance. So, there is really only three what we call companies that have available insurance if you can afford to buy it, according to our records. As you say, Federated has withdrawn and not writing insurance.

We understand fully that the action taken last week by the EPA does not solve the problem. However, we think that Congress, EPA and the States and the regulated communities can have some time to improve this. We have voiced support over time for Senator Burns' bill, S. 1560, which may be a starting point to correct some of the inequity.

SIGMA and NACS believe that the State trust funds are, as we have heard earlier, the most reliable way to satisfy the Federal regulations and to remedy the preexisting contamination. According our records, 37 States have established the funds. However, seven are all that have been approved by the EPA, and 16 are in the hopper to be approved. This number seems to move around from testimony to testimony.

Senator BOSCHWITZ. I know.

Mr. ROBERTS. This is according to our records.

There is a tremendous variation in the State funds, which causes a lot of problems, third party coverage, deductibles, cost recovery, and financing sources. Obviously, the EPA deadline shift is useful in allowing more time for the State funds to come in compliance and go past the real issue that is called paper compliance and get the job done trying to help clean up some of the environmental problems.

Essentially we have two components of our proposal, amending the EPA regulations to require financial responsibility after a new tank is installed.

Senator BOSCHWITZ. Where are you?

Mr. ROBERTS. I skipped this paragraph and went to the next one.

Senator BOSCHWITZ. Where are you?

Mr. ROBERTS. I'm on page 3, the third paragraph.

Senator BOSCHWITZ. Toward the bottom.

Mr. ROBERTS. I figured time was running out and I would get down to——

Senator BOSCHWITZ. That's all right.

Mr. ROBERTS. I don't know about you, but I'm getting hungry. [Laughter.]

I didn't eat any breakfast. [Laughter.]

Senator BOSCHWITZ. Well, you ought to go to one of these convenience stores. [Laughter.]

I have had some hurry-up breakfasts there. [Laughter.]

I am not sure if they were yours, though.

Mr. ROBERTS. No, I don't have anything in this part of the world. The regulations are too stiff. [Laughter.]

Senator BOSCHWITZ. You should try Minnesota sometime.

Mr. ROBERTS. The amending of the EPA regulations would, in fact, by having the tanks installed so that on-site cleanup would just go in, that regulation would just go in. Expand the use of the LUST fund to backstop the State funds. We feel that financial responsibility needs to be realistic. It has become painfully obvious that, as was said earlier—I do not think this is a new expression—the cart has been put in front of the horse. That must have been created in Arkansas or Minnesota, one.

The EPA financial responsibility requirements should kick in when a site becomes insurable, that is, if it is clean. Thus, the regulatory trigger should be put in when the new tanks are installed or upgrades are done. From a small business perspective, private insurance markets, which the gentleman spoke of earlier, would be able to provide financial assurance on clean tanks at the price more affordable than today.

Because the pre-existing conditions worry insurers—they really do—the existing tank sites immediately would fall into State trust fund arenas. And that would allow that to happen under that scenario.

The Federal funds originally established at a $500 million number over a 5 year period will reach that level, I believe, Senator, this year. Our proposal is that existing excise tax, which all gasoline carries today, one-tenth of a cent per gallon, will trigger off at that time. We suggest that that be carried over for 3 more years, and that excess money generated would then be funneled to what we consider to be certified or qualified State trust funds, that is, specifically the States that have enacted the trust fund, the fund that meets minimum specified criteria by the approved EPA program. The EPA then certifies to the Treasury Department that the State fund is in place. We consider such an approach would enable State funds to be actuarially sound. We want the State funds to be sound, which seems to be one of the problems I think EPA is having with it, as we talked earlier.

NACS and SIGMA recommend an approach that would encourage the States to streamline the cleanup process and get on with the program.

I want to shift to another issue which is the small business concern in financing tank compliance.

NACS and its members, the ones that would go in the 99 category—I have some figures which I put in. The pretax profit for the operators have been falling since 1986 with most of the recent figures at 1.3 percent of total sales, or an average of $20,000 per store. The larger store operators that would not be in that 99 category are below that, 16.8. Both of these are experiencing profit declines per outlet.

From a small businessman's profitability, EPA technical and financial responsibilities could not have come at a worse time. And I can underline that in my company. The competitive power of the major oil companies' entry into the convenience store industry—

the very large companies have vast resources to deploy, and some of the marginal players are going to disappear under these scenarios. And it is not going to be what we consider a level playing field.

Thus, in order to remain competitive and to comply with the tank rules and other new environmental initiatives, small and independent business marketers are facing greater capital demands. And outside lending institutions, which I can personally testify to are becoming harder to find. And with the fallout of the savings and loan crisis, the larger banks having their problems, it is going to be harder to find funds to do what has to be done.

Assuming that financial mechanisms are available, small, independent gasoline marketers also face the quality of collateral problem, as was testified here earlier by one of the Senators. You know, you have to clean it up to get it in compliance. So, you are at a catch 22 position to get your loan. You can't do it.

The capital that is required for the next 10 years' compliance, as Mike testified earlier, $10,000 a month may go to $50,000. Where is that going to come from?

Finally, NACS and SIGMA would like to also request some special legislation to improve tank program. Take us out of RCRA. RCRA was a train that was leaving the station and we got put in there with hazardous waste. We need to have a wall built between us and the hazardous waste. And our rules are separate. There is an overlap there that needs to be straightened out.

All we want to do is to hopefully make a profit and to serve our customers and keep the environment that we all live and work in clean.

Thank you, Senator, for your patience in allowing us to come.

[The prepared statement of Mr. Roberts follows:]

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON SMALL BUSINESS

ORAL STATEMENT
OF
F.C. "TALLY" ROBERTS, JR.
ACME PETROLEUM AND FUEL COMPANY, INC.

ON BEHALF OF
THE SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA
AND
THE NATIONAL ASSOCIATION OF CONVENIENCE STORES

MARCH 21, 1990
WASHINGTON, D.C.

Thank you, Mr. Chairman. My name is Tally Roberts. I am Chairman of the Board of Acme Petroleum and Fuel Co., Inc., of Gastonia, North Carolina. I appear today on behalf the Society of Independent Gasoline Marketers of America -- SIGMA -- and the National Association of Convenience Stores -- NACS. Acme is a family-owned business, started in 1935, which owns and operates 125 retail gasoline outlets and convenience stores in North and South Carolina. My company is a member of both SIGMA and NACS, and I have the privilege this year of being SIGMA's president. However, while Acme is a small business, it is not typical of the NACS membership in particular, which is comprised generally of smaller firms. I should add that SIGMA and NACS represent more than 52,000 retail outlets and account for approximately 40 percent of the gasoline sold at retail in the United States.

I will summarize NACS and SIGMA's testimony, which has been submitted for today's hearing record. Mr. Chairman, in the next few minutes, I would like to comment on: (1) the current tank financial responsibility situation; (2) small business problems in financing compliance with EPA's tank regulations; and (3) several areas where legislative improvements can be made to the Federal tank program.

SIGMA and NACS are pleased that EPA has changed by one year the deadlines for demonstrating financial responsibility for owners and operators of 99 or fewer tanks. We sincerely appreciate the efforts of members of this panel in this regard. However, NACS and SIGMA have not stopped "flying the flag upside-down" on financial responsibility. We believe that EPA should have made a deadline change for the other compliance categories, particularly owners of 100 to 999 tanks. While the compliance deadline -- October 26, 1989 -- already has passed for this particular group, many marketers in that category are small businesses and face many of the same problems as companies in the two compliance groups that received relief from EPA. SIGMA and NACS will ask EPA to reconsider its decision in this regard, noting the severe competitive distortions that could occur if further action is not taken by the Agency.

In addition, NACS and SIGMA understand fully that EPA's action last week does not solve the financial responsibility situation. A delay of EPA's compliance deadlines enables Congress, EPA, the States, and the regulated community to address how to improve tank financial assurance. We have voiced our support for Senator Burns' bill, S. 1560, as a starting point for such efforts.

SIGMA and NACS believe that State tank trust funds are the most reliable way to satisfy the Federal regulations and to remedy pre-existing contamination at tank sites. Today, 37 States have established trust funds. However, only seven have been approved by EPA, while another 16 States have their funds awaiting action by the Agency. As noted in our written submission, there is tremendous variability among the State funds, including third-party coverage, deductibles, cost recovery and financing sources. Obviously, EPA's deadlines shift is useful in allowing more time for State funds to be enacted and improved and to become operational -- that is, to go beyond "paper" compliance and actually clean-up tank leaks.

The deadlines shift, as I noted previously, allows Congress and everyone an opportunity to craft a better solution. NACS and SIGMA want to play an active role in this process. Accordingly, we would like to offer a reasonable and workable suggestion for the Committee's consideration. Our proposal is spelled out in more detail in our written submission, but let me highlight it for members of the panel.

Essentially, SIGMA and NACS' proposal has two principal components: (1) amending EPA's regulations to require financial responsibility only after a new tank is installed, an existing tank is upgraded, or a site is cleaned-up; and (2) expanding the uses of the Federal LUST Trust Fund to "backstop" State tank trust funds. SIGMA and NACS support a financial responsibility requirement, but seek one that is realistic.

It has become painfully obvious that the "cart has been put before the horse" in terms of the Federal tank regulatory program. EPA's financial responsibility requirements should "kick in" when a site becomes insurable -- that is, if, and when, it is

"clean." Thus, the regulatory "trigger" should be when a new tank is installed, an existing tank is upgraded, or a tank site is cleaned-up. From a small business perspective, private insurance markets would be able to provide financial assurance for such "clean" tanks at a price more affordable than today.

Because pre-existing conditions "worry" insurers -- and have limited availability and skewed affordability for small business tank owners -- existing "dirty" sites immediately would fall into the State tank trust fund "arena." However, because of concerns that some State funds are projecting total liabilities far exceeding total revenues, SIGMA and NACS recommend an extension of the Federal LUST Trust Fund. The Federal fund, originally established at $500 million over a five year period, will reach this level later this year. The existing excise tax -- 1/10 cent per gallon -- will "trigger" off at that time. This tax, thus, could be extended for an additional period of time, such as three years, and the excess amount generated over the $500 million could be "funneled" to the State tank trust funds on formula basis, provided that: (1) the State has enacted a trust fund; (2) the fund meets minimum specified criteria and has been approved by EPA; and (3) the Agency certifies to the Treasury Department that the State's fund is in place. Such an approach will enable State funds to be actuarially sound, will give the political and economic incentive to those States without funds to adopt them, and will assure that actual clean-ups will be accomplished. NACS and SIGMA's recommended approach also would encourage the States to "streamline" the clean-up process, so as to cost-effectively use trust fund monies and to move tanks as quickly as possible from the fund to the financial responsibility program.

Let me "shift gears" and address briefly small business concerns in financing their tank compliance activities. The issue goes beyond affordability problems with tank leak insurance.

Take, for example, NACS and its membership. Approximately 65 percent of NACS' members fall into the less than 99 tanks categories. Pretax profits for these

operators have been falling since 1986, with the most recent figure at 1.8 percent of total sales or an average of just $20,736 per store. Some of the drop is directly attributable to tank and other environmental regulations. Labor costs factor high, as well. For the larger NACS members, pretax profits have been falling for a longer period, since 1984, to its current level of 1.9 percent of total sales or $16,800 per store. Thus, on a per-store basis, the small companies tend to be more profitable than the larger ones, but both have been experiencing profit declines for years.

From a small business profitability perspective, EPA's technical and financial responsibility regulations could not have come at a worse time. The competitive power of the major oil companies' entry into the convenience store industry is accelerating at a rapid rate. These very large companies have vast resources to deploy, and in many markets, will likely drive marginal players from the field. Independent gasoline marketers, ability to compete on an even "playing field" is paramount, especially now that nearly $4 billion a year is being spent by major oil on gasoline marketing, including building convenience stores.

Thus, in order to remain competitive and to comply with the tank regulations and other new environmental initiatives, small and independent gasoline marketers are facing greater capital demands and must turn to outside lending institutions. I personally can attest to the increased scrutiny from lenders, who are concerned with their potential liabilities from loans secured by real estate with tanks. However, beyond the lender liability issue, which is a real one, NACS and SIGMA members are concerned that traditional real estate financing will be increasingly more difficult because of the "fallout" from the savings and loan "crisis" and troubles with the real estate portfolios of some large banks. Thus, alternative financing methods will have to be explored and developed. Perhaps, this Committee could act as an ongoing forum for such an activity.

Assuming that financing mechanisms are available, small and independent gasoline marketers also face a "quality of collateral" problem. Our businesses

historically have been highly leveraged, and it is uncertain that sufficient equity exists to secure the capital requirements predicted to be necessary over the next 10 years for environmental compliance activities alone.

Finally, NACS and SIGMA's written submission suggests several legislative changes to improve EPA's tank program. SIGMA and NACS are concerned with the regulatory overlaps between the Agency's tank program and other environmental regulations that are slowing down cleanups and increasing costs unnecessarily. For example, EPA's toxicity characteristic rulemaking, which was issued on March 5, defers tank leak clean-ups from the TC rule, pending further study. EPA, in the preamble to the TC rule, states that the "imposition of the Subtitle C (hazardous waste) requirements is also likely to delay clean-ups significantly and severely discourage self-monitoring and voluntary reporting essential to the implementation of the UST program." Congress needs to tell EPA unambiguously that a tank leak clean-up should and must be handled differently than a RCRA Subtitle C corrective action. Our recommendations for legislative changes are intended to build such a "wall" between the tank program and these other environmental programs. It is imperative that a clear line be drawn by Congress. The environment and the public will benefit and independent gasoline marketers' limited resources will be more effectively deployed.

SIGMA and NACS appreciate this opportunity to present their views. I will be happy to answer any questions my testimony may have raised.

Senator BOSCHWITZ. I thank all of you. I find all the testimony valuable.

Mr. Hitz, who has looked into the insurance elements of this particularly in conjunction with the Minnesota plan, do you also believe that—are you following the legislature in our State? Are they going to come up with something that will alleviate some of the concerns?

Mr. HITZ. I think that there is a pending goal right now to increase the limit from $250,000 to $1 million. And if that is passed, presumably it will meet the EPA financial responsibility requirements and really does solve the problem in the State of Minnesota.

I guess really the problem is the fact that all the other States have not acted similarly, and they all have slightly different approaches. And they do not all provide an adequate amount of limit or coverage or have too high a deductible for a small gasoline station business to live with. I think the Minnesota plan currently provides 90 percent coverage up to $250,000. So, the owner is expected to bear 10 percent of the cost himself, which on a $1 million loss is $100,000. So, it is considerable. But on the average loss, it is only $40,000 or $50,000. I think that has been the experience of our Petrofund. And so, we are talking about a $4,000 participation by the owner, and that certainly is not excessive.

Senator BOSCHWITZ. It makes it hard to borrow money if you have 40 or 50 tanks I would imagine.

My staff says that Minnesota is likely to cap it at $25,000, the liability of the tank owner.

Did you want to say something?

Mr. ROBERTS. I just wanted to comment on the question that you raised earlier on the other panel in reference to the cost of the insurance per outlet. I think that Jeff Leiter gave me this information. He is our attorney. The cost on February 9, 1988 under Petromark, which is one of the larger——

Senator BOSCHWITZ. Under what?

Mr. ROBERTS. The cost per outlet on February 8, 1988 of the Petromark insurance premium was $1,350 for a $5,000 deductible, $1 million per occurrence and $1 million aggregate. At February 1, 1988, that is this February—the same deductible limits have gone to—I mean, with all of the same limits have gone to $8,830 per outlet.

Senator BOSCHWITZ. Per outlet.

Mr. ROBERTS. Per outlet.

I just quoted earlier that the average store in NACS made $20,000. So, he is going to spend $8,800 of his profit to buy $1 million worth of insurance.

Mr. HITZ. May I interject a comment? He is referring to Petromark. One of the reasons they increased their rate was at the recommendations of their actuaries who, also based on their estimate of loss reserving at year end 1989, find Petromark to be insolvent, so that they have a deficit of supposedly something on the order of $3 million or $4 million at this point, and have voluntarily surrendered to state regulatory supervision, which is why they are not accepting any new business. There is a real question as to whether they are, in fact, insolvent.

Mr. ROBERTS. That is correct.

Mr. HITZ. And they are having another actuarial firm review those reserves.

But, obviously, the $1,350 presumably was not an adequate price and whether $8,800 is an adequate price is unknown.

Mr. ROBERTS. Well, I want to take that scenario. We operate 125 outlets. Now, if I were to have to come in compliance, which I don't——

Senator BOSCHWITZ. A million one hundred thousand dollars.

Mr. ROBERTS. That is correct. And my firm made about $400,000 last year. Now, that is how ridiculous some of this goes.

Senator BOSCHWITZ. It was on the average.

Mr. ROBERTS. That is right. We take a lot of perks out of our business.

Senator BOSCHWITZ. I wouldn't say that right here. [Laughter.]

Mr. ROBERTS. The IRS will be there tomorrow I know.

Senator BOSCHWITZ. Well, let me say I think this is the first hearing we have had certainly in this Committee on this problem. And hearings of this type do much to raise the visibility of the problem and are the first step in seeking a solution to the problem. If you think that Minnesota State Legislature is slow, watch us in action.

We appreciate your testimony this morning. I appreciate the gentlemen from the EPA, and I will talk to you for just a minute prior to your leaving.

I again apologize for being late. But I was on the floor of the Senate offering an amendment with respect to small business concerning the Clean Air Act which, as you may know, very much affects you guys, maybe not in rural North Carolina or up on the range in Minnesota, but it certainly could. And in areas exceeding the standard for ozone, service stations dispensing more than 20,000 gallons per month are required to install equipment, gasoline pumps to reduce emissions of VOCs, which are the chemicals that are emitted into the air through gas stations, coming out of the tanks, and so forth. So, this provision could affect some people in your industry as well, and of course, the bill certainly affects all of your customers.

This bill is a mine field to small business. And regretfully so often we do not know the impact of our deeds around here, and I am afraid that this is very much a matter in what we have before us on the floor. We were not able to get quite the relief we wanted for small business, but we came pretty close. So, hopefully we will have headed off some of the problems on this bill, but we probably do not know what the problems are. We will be sitting here with a panel, perhaps with the same people, and we will hear that these risks are not insurable and that some kind of legislative remedy has now to be undertaken to cure the legislative remedy that we passed in the first place because, as I say, we often do not know the impact of our deeds.

But I appreciate your coming, and your testimony and your time here will be put to good use. We will try to now repair the earlier actions of the Congress and try to see if we cannot make small business sustainable, so that all of these businesses are not just swallowed up. Enough of that has occurred already or a great deal of it has occurred.

I don't have any objection to that. I understand that you may eventually want to sell or you may want to sell yours, Mr. Troutwine, and you should have the opportunity of doing that. Somehow after a business gets big enough, it is not really able to compete well. In my business experience, I always found that the bigger the competitor was, the more easily I could compete with him if I managed my own business.

I do appreciate all of your coming, and we will look into this carefully. We invite you to continue to talk to our staff and we will look for a legislative conclusion, together with Senator Burns and Senator Bumpers and other Members of this Committee and the Congress.

Unless you have any further comments, questions or statements, we will consider this hearing adjourned.

[Whereupon, at 12:11 p.m., the Committee was adjourned.]

APPENDIX

THE OILMEN'S INSURANCE PLAN

A Division of OIL MARKETERS OF AMERICA RISK MANAGEMENT CORP.
350 Fifth Avenue, Suite 6805, The Empire State Building
New York, NY 10118, Tel: (212) 629-4290, Fax: (212) 629-3954

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON SMALL BUSINESS

WRITTEN STATEMENT
OF
THE OILMEN'S INSURANCE PLAN

April 5, 1990
NEW YORK, NEW YORK

Oilmen's Insurance
Suite 6805
350 Fifth Avenue
New York, New York 10118
(212) 629-4290

Jane Jachimczyk
Peter J. Gerken

Re: Pollution Liability Insurance and UST's

BACKGROUND

Oilmen's Insurance is the product name for a range of property and liability insurance coverages designed expressly for independent re-sellers of refined petroleum products, i.e. oil marketers. Our universe of potential insureds would tend to coincide with the type of businesses that would belong to the Petroleum Marketers Association of America. Our average account would look like its average member.

The insurance we offer is sold in 30 states by independent agents who have been granted exclusive rights to represent this program. Policies are issued through the Fireman's Fund Insurance Companies and reinsured principally through Oil Marketers Insurance Company. Annualized written premiums excluding pollution insurance, are approximately $35 million.

Pollution liability insurance on underground tanks has been offered as a separate claims made policy with a $500,000 limit since late 1985. Very little of this coverage has actually been

sold because our underwriting and pricing were substantially tougher than competing programs since day one. Since that time however, the market has risen much closer to our pricing and underwriting practices.

Since the EPA financial responsibility regulations were first proposed, and specifically since the final rules were issued in 1988, we have been actively working to upgrade our pollution product. Our motivation has been twofold:

1. We wanted to be able to offer our customers a policy that would conform to EPA requirements, and
2. Our original approach to coverage of leaking underground tanks needed revision in light of the changing times, laws and technologies.

CURRENTLY, we are still hard at work on our new product and are hoping to finalize it within the next few weeks. However, we have had difficulty obtaining adequate reinsurance support and until all needed reinsurers "sign on the dotted line" we have nothing to sell. The purpose of these comments is to update you on what we have been trying to get accomplished.

INSURANCE IS A FINANCIAL MECHANISM, operating on the law of large numbers, that spreads a given risk among many similarly

situated entities. There are two main components of a premium dollar: expense (which includes administration and overhead, commissions and taxes) and loss (funds to pay for claims).

Underground storage tanks are difficult and expensive to insure because there are potentially huge losses and costs that need to be covered. There are two principle reasons that tank insurance premiums have "skyrocketed" over the past few years:

1. The early companies that wrote this kind of coverage for as little as $100 per station didn't know what they were doing.

2. The cost of claims, clean up and potential third party liability was and continues to be more expensive than some people realized. Larger loss costs demand higher premiums.

In the short run these costs will increase. As stations are cleaned up and upgraded, it is our belief that loss costs and thus premiums will come down.

FROM AN INSURER'S POINT OF VIEW, the largest single risk in writing pollution insurance is that the tank could be leaking at

the time coverage is sold. Most of our work to date has been in determining how best to handle this problem so that we, Fireman's Fund, and our reinsurance partners are at ease.

We have determined that the most cost effective solution is statistical analysis of daily inventory reconciliation records for the purpose of seeing whether the tank is leaking <u>today</u>, before it is insured. We have associated with Warren Rogers Associates for this purpose.

If screening is not done to select out currently leaking tanks, a per tank premium of over $7,000 would be necessary to fund the risk. It is our belief that those insurance companies no longer writing today, or those that are in trouble today, did not adequately deal with this reality.

STATE TRUST FUNDS need to understand this lesson as well, both in their underwriting and the amount with which they are funded. We believe that state funds have an important role to play and that their administrators must realistically evaluate prior contamination and clean up costs. A pollution clean up loss will not be likely to cost them any less than it does us.

We seriously question the role of state funds in the area of third party liability coverage. An insurer is supposed to protect the interests of its clients. A state fund has too many

conflicting interests to protect to do a proper job in the liability area. Lastly, we do intend to write our policy so that it could "wrap around" some state funds. Our limits will be discrete. We will not pay on behalf of state funds if they should begin to fold.

Oilmen's Insurance does not intend to insure prior contamination and that will be reflected in our underwriting, the language of our insurance policies and in our pricing. Premiums for fully upgraded facilities will be substantially less than those of a bare steel variety.

In addition to the initial screening, we will require that analysis of daily inventory reconciliation records be done every 30 days by Warren Rogers Associates so that new leaks can be discovered early and cleaned up quickly...on a much less costly basis. Since the vast majority of petroleum marketers keep these records on a regular basis, such an analysis should present no hardship. The cost of the independent analysis will be built into our premium.

IN SUMMARY, Oilmen's today does not offer coverage for underground storage tanks in conformance with EPA requirements. We have been diligently working on the development of such coverage but have been unable as yet to pull together necessary

reinsurance support. If and when we are able to do so, our product will be offered to petroleum marketers who buy the rest of the package of insurances that we sell. We can not sell it on a stand alone basis.

Furthermore, all applicants for this type of coverage will be screened carefully and the premiums charged will be adequate to cover both components of expenses and loss. To many oil marketers this process may seem onerous and expensive. We honestly don't like charging high prices any better than our customers will like paying them, but the bottom line here is that a "reasonable" price must be "realistic" otherwise we'll both be out of business.

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